Google

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/

EB
ART
TRE
V. 1

A

TREATISE

OF THE

LAW OF PROPERTY

ARISING FROM THE RELATION

BETWEEN

Husband and Wife.

BY R. S. DONNISON ROPER, ESQ.
OF GRAY'S INN, BARRISTER AT LAW.

THE SECOND EDITION,

WITH ADDITIONS,

BY EDWARD JACOB, ESQ.
OF LINCOLN'S INN, BARRISTER AT LAW.

VOLUME THE FIRST.

LONDON:
JOSEPH BUTTERWORTH AND SON, LAW BOOKSELLERS,
43, FLEET STREET.

1826.

TO

THE HONORABLE

SIR JOHN BAYLEY, KNT.

ONE OF THE JUSTICES

OF

HIS MAJESTY'S COURT OF KING'S BENCH,

THIS WORK

IS,

WITH HIS LORDSHIP'S PERMISSION,

RESPECTFULLY INSCRIBED.

PREFACE

BY THE

AUTHOR.

A DIGEST of the Law of Property as founded upon the relation between husband and wife being called for by the profession, it has been attempted by the author, in the following treatise. In collecting the cases on the subject, which are scattered through a variety of books, his object has been to concentrate all that he considered elementary for the student, and useful to the practitioner. In traversing so wide a field the author is aware that many things worthy of notice may have escaped his observation; he has, however, treated upon every point connected with his subject which occurred to him as useful in practice, studiously avoiding the introduction of abstruse discussions unconnected with practical questions.

The author has endeavoured to express himself throughout his treatise in such a manner as to be easily understood, but in instances where he may have failed to have so done, the defect

can be supplied by the reader on consulting the cases, which the author hopes, from the attention he has paid to the correction of the press, will be found accurately referred to in the notes.

That the work, after all the care the author has been able to bestow upon it, is perfect, is what he cannot venture to assert; but that it is as free from imperfection as his humble talents, experience, labour, and researches will permit, he may with truth declare.

The precedents contained in the Appendix to the second volume, although not intended as guides to the experienced conveyancer, will, it is hoped, be found illustrative of the work, and useful to the younger branches of the profession.

In conclusion, the author desires to express his gratitude to his friends Mr. Koe of Lincoln's Inn, and Mr. Keene of Gray's Inn, for the assistance they have afforded him during the progress of his work.

ADVERTISEMENT

TO THE

PRESENT EDITION.

In this Edition, the decisions which have appeared since the first publication of the work have been incorporated, and notes have occasionally been added. The passages introduced into the text are distinguished from the original matter, by being inclosed in brackets. The Editor has subjoined to the second volume *investigations* of some points connected with the subject of the treatise.

CONTENTS

OF THE

FIRST VOLUME.

RIGHTS OF HUSBAND IN HIS WIFE'S REAL ESTATES.

CHAPTER I.

CURTESY.

PAGE

SECT. I. *Who may be tenants by the curtesy* . 5

SECT. II. *Of what estates and seisins of the wife—*

1. *Of what estates* 6
2. *Of what seisins, viz.*
    1. *Seisins in fact* 6
    2. *Seisins in law* 17
    3. *Seisins in equity* . . . 18

SECT. III. *Of the issue as to curtesy* . . 29

SECT. IV. *The nature of the estate of tenant by the curtesy, together with the incidents, privileges, and powers belonging to it* . . 35

SECT. V. *How curtesy may be defeated and barred—*

1. *By recovery or eviction under a title prior to the marriage, distinguishing between conditions and limitations* . . 37
2. *By the joint acts of husband and wife* . 44
3. *By the husband's acts singly* . . 45
4. *By the wife's acts alone* . . . 48

HUSBAND'S POWER OVER HIS WIFE'S REAL ESTATES.

CHAPTER II.

DISCONTINUANCE, REMITTER, AND FORFEITURE.

PAGE

SECT. I. *The interests of husband and wife in real estates given or devised to them during marriage, and the effect of gifts or grants from the one to the other* 51

SECT. II. Discontinuances *of the wife's estate by her husband, and the remedies which the common and statute laws have given to her, and the persons claiming her estate, against such acts* 55

SECT. III. *The doctrine of* remitter . . 67

SECT. IV. *The husband's power to* forfeit *his wife's copyholds; and in what instances a Court of Equity will give relief* . . 81, 85

CHAPTER III.

LEASES.

SECT. I. *Leases at common law of wife's estate granted by her husband and herself jointly, or by him singly* 90

SECT. II. *Leases granted by them under stat. 32 Hen. VIII. chap. 28* 95

SECT. III. *Leases granted by husband and wife under* powers *in private conveyances* . . 116

CHAPTER IV.

CHARGES BY HUSBAND ON HIS WIFE'S REAL ESTATES.

SECT. I. *The husband's power to charge his wife's real estates with payment of his debts* . 137

PAGE

SECT. II. *The wife's equity to have her estates, so charged, exonerated out of her husband's assets* 143

SECT. III. *The effect when the equity of redemption is reserved not to the wife, but to her husband, &c.* 153

RIGHTS OF HUSBAND IN, AND POWER OVER HIS WIFE'S PERSONAL ESTATE.

CHAPTER V.

WIFE'S PERSONAL ESTATE IN POSSESSION, IN ACTION, AND IN AUTRE DROIT.

SECT. I. *The interest which the husband has in the personal estate and real chattels which belonged to his wife* before *marriage, and the validity of dispositions of them by her in contemplation of the marriage, without her husband's privity* 162

SECT. II. *The husband's interest in, and power over the personal estate and real chattels which are in his wife's* possession *at the time of the marriage, and such as she* becomes possessed *of during its continuance; and the effect of the wife's* will *made with his consent and by his authority* 168

SECT. III. *The interest of the husband in, and his power over the personal estate and real chattels which his wife is possessed of or intitled to as* executrix *or* administratrix; *and his* liabilities *in respect of them* . . . 187

SECT. IV. *The husband's interest in, and power over such of his wife's personal estate and real chattels as are* not in possession, *but are* immediately recoverable *by action at law, or suit in equity* 203

CHAPTER VI.

WIFE'S PERSONAL ESTATE IN REMAINDER OR EXPECTANCY.

PAGE

SECT. I. *The husband's* power *over his wife's choses in action by* release *and* assignment *at law and in equity* 223
1. *At law* 224
2. *In equity* 225

SECT. II. *The effect upon the wife's title by* survivorship *of her husband's assignment, or the law's transfer of her choses in action which are* immediately *recoverable, or are in* remainder *or* expectancy.
1. *Effect upon the wife's title, as the* survivor, *of the assignment* to *assignees in bankruptcy, or under the insolvency of her husband, of* her choses in action . 227
2. *The effect of assignments* by *such assignees upon such title; and of sales of* reversionary interests . . . 232
3. *The effect of assignments by the husband of his wife's choses in action to a* particular *assignee for a* valuable *consideration* 238
4. *The effect of the wife's examination and consent in a Court of Equity to the assignments* 246

CHAPTER VII.

WIFE'S EQUITY TO A SETTLEMENT, AND THE RIGHTS OF HERSELF AND HUSBAND WHEN HE REFUSES TO MAKE ONE.

SECT. I. Equities *of wife and children to a* settlement *out of her choses in action* . . 256

PAGE

1. *Against her husband; and her character as a ward of the Court of Chancery is considered* 260, 266
2. *Against his assignees in bankruptcy, &c.* 268
3. *Against his assignee, a purchaser for a valuable consideration* . . . 268
4. *When payment or transfer of the funds to the husband will defeat his wife's equity* 273
5. *When her own misconduct will have the like effect* 275

SECT. II. *The* rights *of husband and wife in her choses in action when he refuses to make a settlement upon her, or when he deserts her, or when he compels her to quit his house* . 276

1. *When he refuses to make a settlement upon his wife, but maintains or is desirous of supporting* her 276
2. *When he deserts her, or compels her to quit his house; and the rights of her* creditors *upon her equitable property in such cases* 277
3. *When the wife without a sufficient cause withdraws from or refuses to cohabit with her husband* 281
4. *The effect of her misconduct upon her equity for a maintenance* 286

CHAPTER VIII.

SETTLEMENTS.

SECT. I. *Settlements made* before *and in contemplation of marriage* 288

1. *When they will intitle the husband to his wife's choses in action although she be the survivor; and when he or the persons claiming under him will be obliged*

PAGE

to perform his covenants or agreements in order to make a title to such property 289

2. *Of the validity of ante-nuptial settlements against purchasers and creditors as connected with the husband's title as a purchaser of his wife's equitable property* 299

SECT. II. *Settlements made* after *marriage* . 303

1. *Their effect in intitling the husband to his wife's choses in action in prejudice to her title by survivorship* 303

2. *Of the validity of such settlements against purchasers and creditors. Under which title are considered settlements that are fraudulent, and also such of them as may be supported, although made after marriage, upon the principle of valuable consideration* 306

SECT. III. *As to husband's title upon surviving his wife to such personal estate as by settlement, &c. was limited to* her "*next of kin*" . 327

RIGHTS OF WIFE IN HER HUSBAND'S REAL ESTATES.

CHAPTER IX.

DOWER.

SECT. I. *Who are intitled to dower* . . 333

SECT. II. *Of what estates and interests.*

1. *Of what estates* 341

2. *Of widow's election between two estates or interests* 347

3. *As to her right to endowment of improvements, and when intitled to more than one-third of the estate for dower* . . 349

PAGE

4. *The necessary* seisin *of the husband, and,* 352
5. *Of the issue as to dower* . . . 387

SECT. III. *Assignment of dower* . . . 387

1. *When to be made* 388
2. *By whom* 389
3. *In what manner; and as to remedies for excessive assignments, and of assignments de novo* 390, 406
4. *Effects of assignments in regard to husband's incumbrances* 411

SECT. IV. *Widow's interest, rights, and powers in respect of her estate in dower* . . 416

SECT. V. *Remedies for obtaining dower—*

1. *In a Court of Law* 429
2. *In a Court of Equity* . . . 448

CHAPTER X.

JOINTURES.

SECT. I. Legal *jointures* 460

SECT. II. Equitable *jointures* . . . 486

SECT. III. *The jurisdiction of Courts of Equity in assisting and relieving jointresses. Under which section are considered—*

1. *Contracts and* covenants *to settle jointures* 491
2. *Jointures under* powers . . . 496

SECT. IV. *The* performance *and* satisfaction *of* covenants *to make jointures* . . . 509

1. *Of the* performance *of such covenants* . 510
2. *Of the* satisfaction *of them* . . . 513

SECT. V. *The wife's interest in her estate in jointure, and the incidents, privileges, and powers belonging to it—*

1. *As to the interest* 518

PAGE

2. *Of her absolute alienation of her jointure with her husband, or merely to secure his debts* 520
3. *Of the bar or forfeiture of her jointure* 522

CHAPTER XI.

HOW DOWER MAY BE PREVENTED OR BARRED BY OTHER MODES THAN BY JOINTURES.

SECT. I. *By limitations in purchase deeds* . 525
SECT. II. *By assignments of terms for years in trust for the purchaser* 529
SECT. III. *By bars effected by husband and wife after marriage, viz.*
1. *By husband and wife* jointly; *and the effect of the husband's covenant that his wife shall join him in levying a fine* . 536
2. *By the* husband singly . . . 549
3. *By the* wife singly *during the marriage* 559
4. *By her after her husband's death* . 562
Under which head is considered the widow's acceptance of a collateral satisfaction *under her husband's will* . 565

THE WIFE'S POWER OVER HER HUSBAND'S REAL ESTATES.

CHAPTER XII.

SECT. I. *Of the alienations by dowresses, and* by jointresses *whose interests are for* life *only, and the remedies provided against their tortious conveyances* 604
SECT. II. *Of the alienations by jointresses whose provisions were given or settled upon them in* tail, *and the remedies provided against their discontinuances, and particularly by stat.* 11

PAGE

Henry VII. chap. 20. In commenting upon which act are considered—

1. *What estates and interests fall within its provisions* 611
2. *What estates and interests are not within its provisions* 617
3. *What alienations by widows are and are not forfeitures* 623
4. *Of entries under the statute and when such rights are destroyed* 625

SECT. III. *The effect of the statute upon the practice of Courts of Equity in decreeing a specific performance of marriage articles* . 630

A

TREATISE

ON THE

LAW OF PROPERTY

ARISING FROM THE RELATION

BETWEEN

HUSBAND AND WIFE.

Introductory Remarks.

By marriage, the husband and wife are as one person in law. Upon this union depend almost all the legal and equitable rights and disabilities which either of them acquires or incurs by the intermarriage. The very being or legal existence of the woman is by the common law suspended during the marriage, or at least it is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs every thing (*a*). Modern times have introduced exceptions to this doctrine, as will appear in the progress of this work; but the general rule still continues, and its wisdom is proved from the inconveniences that have been felt by a departure from it.

The reasons upon which the law virtually suspends the existence of the woman during the coverture appear

---

(*a*) 1 Black. Com. 442. Litt. sect. 168—291.

to be these :—first, for her husband's safety, in depriving her of the power to injure him by any act without his concurrence, or his assent, either expressed or implied ; and, secondly, for her own security, in guarding against the husband's influence over her, by disabling her from disposing of her own property, except by those methods and with the solemnities which the law itself prescribes.

I shall consider the subject of this treatise under the four following general divisions, viz.—

First : The rights acquired by the husband in the real and personal estates of his wife ; and his power over the same.

Second : The rights acquired by the wife in the real and personal estates of her husband ; and her power over the former.

Third : The effects of marriage upon the acts and agreements of husband and wife prior to marriage, and the husband's liability in respect of those acts and agreements. And,

Lastly : The disabilities of coverture, and the exceptions to them.

CHAPTER I.

The Rights acquired by the Husband in his Wife's real Estates.

By the intermarriage the husband acquires a freehold interest, during the *joint* lives of himself and wife, in all such freehold property of inheritance as she was seised of at that time, or may become so during the coverture (*a*). Upon this freehold there may be a *remitter* (*b*). The husband *alone* may make a tenant to the *præcipe* for suffering a recovery (*c*); and he may take a release or confirmation to enlarge his estate (*d*): but if he be attainted of felony, the king will not acquire the freehold, it remaining in the wife, but the pernancy of the profits only during the coverture (*e*). The husband's interest may be defeated by the act of his wife *before* the birth of issue. If, therefore, she be attainted of felony, the lord by *escheat* may enter and eject the husband, so soon as it appears by due process that the king has had his prerogative forfeiture, of a year, day, and waste (*f*); but not so if the attainder happen *after* the issue are born (*g*), for then the husband is intitled to an estate for his own life, and in his own right as tenant by the curtesy *initiate*. *After* the birth of issue, the husband *alone* is intitled to do homage to the lord for the lands, but before issue born he and his wife must have performed that service together (*h*); so that upon the birth

---

(*a*) And the husband acquires jointly with the wife a seisin in fee in the wife's freehold estates of inheritance: the husband and wife are seised in fee in right of the wife. See Gilb. Ten. 108. Co. Litt. 67. *a*. 1 Saund. 253. *n*. Polyblank *v*. Hawkins. Dougl. 314.

(*b*) Co. Litt. 351. (*c*) Pigg. Rec. 72. Cruise Rec. 58.
(*d*) Co. Litt. 299. (*e*) Co. Litt. 351. (*f*) 4 Hawk. Pl. Co. 78.
(*g*) Co. Litt. 351. (*h*) 2 Black. Com. 126; see *infra*, sect. 5, pl. 3 and 4; and see Co. Litt. 67. *a*.

of issue the husband becomes tenant to the lord, which necessarily prevents an *escheat* to him for felony committed by the wife. This leads to the consideration of the husband's title to his wife's estate, as—

TENANT BY THE CURTESY.

In treating of this subject I shall consider—

I. Who may be tenants by the curtesy.
II. Of what estates, and seisins of the wife.
    1. Of what estates.
    2. Of what seisins—viz.
        1. Seisins in fact.
        2. Seisins in law; and
        3. Seisins in equity.
III. Of the issue as to curtesy.
IV. The nature of the estate of tenant by the curtesy, together with the incidents, privileges, and powers belonging to it.
V. How curtesy may be defeated and barred.
    1. By recovery or eviction under a title prior to the marriage, distinguishing between conditions and limitations.
    2. By the joint acts of husband and wife.
    3. By the husband's acts singly; and
    4. By the wife's acts alone.

CURTESY.

Its derivation.

The term curtesy, according to Judge Blackstone, was probably derived from the husband's attendance at the lord's court or *curtis*, in respect of the wife's real property. So soon as a child was born the father began to have a permanent interest in the estate, became one of the *pares curtis*, did homage to the Lord, and was called tenant by the curtesy *initiate*; and this estate being once vested by the birth of issue, was not suffered to determine by the subsequent death or maturity of the infant (*a*).

(*a*) 2 Black. Com. 126.

This title of the husband is an estate for life in such lands and tenements of his wife, as she was seised of in fee-simple or fee-tail, upon having issue by her born alive that may by possibility inherit the estate (*a*) by descent from her.

Four circumstances are requisite to complete this title of the husband, viz. a legal marriage (*b*)—seisin by the wife of the estate—inheritable issue—and her death.

Who are and who are not capable of being tenants by the curtesy.

I. All such persons may be tenants by the curtesy who are legally married, and are permitted by the laws to hold and enjoy real estate. An alien, therefore, is not one of such persons, because he is not allowed by the policy of the law to enjoy and retain lands for his own benefit (*c*): but he may be naturalized or made a denizen. The one is the act of the legislature; the other that of the king *alone by letters* patent. The former removes all defects and disabilities *ab initio;* the latter only removes them from the date of the instrument. If, then, an alien husband be made a denizen and *afterwards* have issue, as such issue may inherit, the husband will be intitled to curtesy; but if the issue were born *before* the denization, and the husband had none afterwards, he would have no title to curtesy, because no issue which he ever had could inherit his wife's estate; the father prior to his being made a denizen having no inheritable blood to transmit to his children. If, however, he were naturalized, since that Act had a retrospective operation, he would be intitled to curtesy, whether he had issue by his wife before or after the passing of the legislative provision.

Aliens.

Difference between denization and naturalization.

Idiots.

It seems to have been the doctrine of the law in ancient times, that if the wife were an *idiot*, her husband would not be intitled to curtesy, so that if lands descended to a feme idiot, who had issue, and her husband entered, and then she was found an idiot by office, the

---

(*a*) Litt. sect. 35—52. (*b*) See "Dower," chap. 9, sect. 1.
(*c*) Co. Litt. 2. *b*. 1 Lev. 59.

king by prerogative would have been intitled to them discharged from curtesy (*a*). It seems, however, agreed at present, upon principles of sound sense and reason, that an idiot cannot marry, she being incapable of consenting to any contract; this doctrine, therefore cannot now take place (*b*).

II. Of what estates and seisins.

1. *Of what estates.*

Property to which curtesy attaches.

The species of property subject to curtesy are manors, lands and tenements, of which actual seisin may be obtained by the wife; and of various hereditaments, such as rents, tithes (*c*), commons, advowsons (*d*), offices of inheritance, trusts, equities of redemption, &c. (*e*).

To what not.

But of the following particulars there can be no curtesy: viz. of a mere right, title, condition, personal inheritance, &c. (*f*).

If, therefore, the wife be grantee of a personal annuity to her and her heirs, and have issue, the husband cannot claim it after her death, as tenant by the curtesy.

The reason why curtesy was not applicable to such matters was probably its origin in feudal times, and its being incident and necessary to tenure.

2. *Of what seisins.*

The subject of seisin the reader will find fully entered into in the first chapter on Dower (*g*), to which he is referred for the particular cases which may not be noticed in this section.

(*a*) Co. Litt. 30. 2 Black. Com. 127. (*b*) See post. chap. 9. sect. 1. (*c*) Co. Litt. 29. (*d*) Ibid. (*e*) Litt. sect. 35. Perk. sect. 457—463. Plowd. 379, *b*. (*f*) Co. Litt. 29. Perk. sect. 457 and 463. 7 Vin. Abr. 160. (*g*) Chap. 9 of this work, sect. 2. pl. 4.

1. *As to seisins in fact.*

In all cases where actual seisin by the wife can be acquired, as of lands and tenements, it must be obtained in order to found the husband's claim to curtesy (*a*). The reason is, to enable the heir to take the estate from her in that character, which is essential to the husband's title; for it is a rule of law, that the heir, claiming by descent, must derive his title from the person last actually seised of the inheritance. If, therefore, the wife was not so seised, he could not inherit it from her; so that one of the requisites of the husband's title to curtesy would be wanting, viz. issue that could inherit the estate by descent from the wife. The reader will find this subject fully and ably discussed and explained in the case of *Doe* v. *Hutton*, decided in the Court of Common Pleas, and reported in *Bosanquet* and *Puller*'s Reports, vol. iii. p. 643.

Entry upon an estate descended to the wife necessary.

Actual seisin of the inheritance by the wife of her lands and tenements being required, for the reasons before stated, to intitle her husband after her death to curtesy, that estate will not arise unless there be an entry in her lifetime.

If, therefore, *A* be seised of lands in fee which descend upon his daughter *B*, who marries and has issue; but *B* dies before entry by herself or her husband, or other person for them; he shall not be tenant by the curtesy, because his wife had only a *seisin in law* (*b*).

Disseisin *before* and no re-entry *during* marriage, no title to curtesy.

Suppose, also, that a woman was disseised of her estate *before* her marriage, and no entry was made during the coverture, the husband would not be intitled to curtesy; for whilst the marriage lasted, his wife had a *right* of inheritance only, and he cannot intitle himself to curtesy by an entry after her death (*c*).

(*a*) 6 Term Rep. 679—680. (*b*) Co. Litt. 29. (*c*) Perk. sect. 458.

Contra if disseisin be *after* marriage.

But the reverse would be the case if the disseisin took place *after* the marriage, for the wife being *seised* during the coverture, and the husband's title being inchoate by the marriage and the birth of issue, and he having obtained a right of entry in respect of such title, may pursue it after his wife's death; but in the former case, his title depended upon his entry during the marriage, which right of entry was not in respect of any title to curtesy, but to him and his wife jointly, in *right* of his wife *during* the marriage, which entry it is obvious he could not make after the coverture had determined (*a*).

As to suspension of the freehold, &c.

So also the *suspension* of the *freehold* in seigniories, rents, commons, and the like, during the marriage, will prevent the husband's title by the curtesy: but if the suspension be for *years* only, it will not have that effect, the possession of the termees being in law the possession of the husband and wife (*b*).

Since to enable the issue to inherit, as the wife's heir, her *actual* seisin is necessary, as I have before observed, it has been said, and correctly, that if the husband had gone towards the land, and had done every thing in his power to make an entry, it would not avail, unless he actually entered during the marriage (*c*).

No curtesy upon wife's seisin for life, or tenancy at will.

It has been noticed, that curtesy only arises out of the seisin of the wife of an estate in fee-simple or fee-tail, and of whom the husband may have inheritable issue. If, then, his wife be seised of a less estate than that of inheritance, his title to curtesy will not arise. When, therefore, she is but tenant for *life*, or at *will*, no curtesy attaches; and it is for the latter reason that *copyhold* estates are not by the common law subject to curtesy; the interest of the wife in them being considered as an estate at will only. But since custom is

Consequently not of copyholds;

except by special custom,

(*a*) Perk. sect. 458. (*b*) Co. Litt. 29. *b*.
(*c*) Dect. and Stud. 2 Dial. c. 25. Perk. sect. 470.

the basis of the titles to copyholds, the husband will have a right to curtesy when the custom authorises it; and in manors where such custom prevails, the husband will be so intitled although his wife happens to die *before* admittance (*a*).

which is construed strictly.

This special custom being an exception to the general law of copyholds, is construed strictly. If, then, the custom allowing the husband curtesy relate to women only *who shall be possessed of copyhold lands at the period of marriage*, it will not be extended to include such *other* copyhold lands as she may acquire during the coverture (*b*).

The seisin of the wife must be of the *entire* inheritance at some period during the marriage.

Wife's seisin of a reversion on an estate for life insufficient.

Her seisin, therefore, of a reversion in fee upon an estate for life, will not intitle her husband to curtesy, except that estate determine during the marriage (*c*).

When contingent remainders interposed between her life-estate and her reversion will and will not prevent curtesy.

In cases where, by the *same instrument*, the wife takes an estate for life and the reversion in fee, but *contingent* freehold remainders are interposed; the title to curtesy seems to stand thus,—the legal effect of these limitations appears to be, that the life-estate will merge in the reversion for every purpose except to destroy the contingent interests (*d*); so that if the contingencies never happen, the wife's seisin of the fee not being disturbed, curtesy attaches (*e*); but if they do arise, then the consolidated estates will separate, and the wife be considered as actually seised *ab initio* of an estate for *life* only, to which curtesy does not attach. Thus, in *Boothby* v. *Vernon* (*f*), the Judges put this case,—suppose an estate be given to a woman

---

(*a*) Gilb. Ten. 288. 4 Rep. 22. Hob. 181. 216. Cro. Eliz. 361. See 5 Burr. 2764.

(*b*) 2 Leon. 208. (*c*) Co. Litt. 29. (*d*) 2 Rep. 60. *b*. 2 Saund. 387.

(*e*) Hooker *v*. Hooker, Ca. temp. Hardw. 13. 2 Barn; K. B. 200. 232. 279; and see 2 Saund. 382. *b*. note, Doe *v*. Scudamore, 2 Bos. and Pull. 294. (*f*) 9 Mod. 147.

for life; then to her first and other sons, &c. in tail male, remainder to the *heirs* of *her* body, remainder to *her* right heirs: although it is clear that the woman was *seised* of the inheritance, yet *if* she have a son (as she had in that case) her husband would *not* be intitled to curtesy.

Where her life-estate does and does not merge by *descent* to her of the fee, and of husband's title to curtesy.

But the life-estate may be merged by *descent* of the fee upon the wife, which will destroy the contingent remainders, and give a right to curtesy. The following distinctions seem to reconcile the cases:—If the fee descend to the wife as *immediate* heir to the person devising the several interests, it will not merge her life estate, and create a title to curtesy (*a*); for such a merger would destroy the will in its inception. But when the descent to her is *not* immediate, but *mediate* from the testator, as when the fee first descends to his son and heir, and from the son to the wife; or when it devolves upon her from a devisee in remainder in the will, so that the will is not destroyed in its birth, but its limitations commence and take effect, the descended fee will merge the life-estate, defeat the contingent remainders, and intitle the husband to curtesy (*b*); for merger is an accident to which a *particular* estate is liable *after* its commencement, and it appears that there is not the same reason to exempt it from that accident in the latter cases, as in the instance of an *immediate* descent of the fee from the testator upon the tenant for life.

From the following case will appear the effect upon the title to curtesy of a settlement by *lease* and *release* before marriage of the wife's estate-tail.

(*a*) Archer's case, 1 Rep. 66. Plunket *v.* Holmes, 1 Lev. 11. Raym. 28. and Boothby *v.* Vernon, 9 Mod. 147. 2 Eq. Ca. Ab. 727.

(*b*) Kent *v.* Harpool, T. Jones, 76. 1 Ventr. 306. Hooker *v.* Hooker, Ca. Temp. Hardw. 13. Fearne's Con. Rem. 341, et seq. Crump *v.* Norwood, 7 Taunt. 362; and see *infra*, chap. 9, sect 2, pl. 4.

Feme, tenant in tail in possession, prior to her intended marriage, conveyed lands by lease and release to trustees, to the use of herself and heirs until the marriage, and, immediately afterwards, to the use of her intended husband for life, with remainder to trustees to preserve, &c., remainder to herself for life, remainder to the first and other sons of the marriage successively in tail, with remainder over. Upon a question as to what interest the husband took in the lands, it was contended, and also confirmed by the Court, that a conveyance by lease and release by tenant in tail, neither barred the issue in tail nor created a discontinuance, but passed a base fee voidable by the issue in tail by entry; so that the husband of the wife tenant in tail was not intitled in the present case either to a life estate under the conveyance, or to be tenant by the curtesy; not to the former, because it was not competent to his wife to pass the estate by such a conveyance to the prejudice of her issue after her death: nor to the latter, because the instant that the marriage took effect, the estate was vested in the husband during the *joint lives* of himself and wife, consequently there never was any one moment during the coverture when the wife was *seised* of an estate tail in *possession* (*a*).

Settlement before marriage of wife's estates-tail by lease and release, without fine, will prevent curtesy,—and why.

If a *term for years* only be interposed between an estate for life limited to the wife, and an estate in fee vested in her, or if she be seised of the inheritance subject to a term for years, such chattel interests will not prevent the wife's seisin of the freehold and inheritance, as required, to found the right of her husband to curtesy; for the possession of the lessee is the possession of the wife, as the owner of the freehold and inheritance (*b*).

A term for years interposed between wife's life-estate and reversion will not prevent a seisin of the inheritance to found curtesy.

To this principle the decision in *De Grey* v. *Richardson* (*c*) may be ascribed:

(*a*) Neville *v.* Rivers, 7 Term. Rep. 277. See farther on this subject, chap. 9, sect. 2. (*b*) Co. Litt. 29. *a.* note 1. (*c*) 3 Atk. 469.

A being tenant in tail of estates (to which she succeeded shortly before her death) died, leaving two children, *before* she or her husband were able to receive any of the rents from the tenants, although they had become due. The tenants held the lands under leases. The husband filed a bill for the rents in arrear, and also claimed a title to curtesy of the estate tail. And this demand and claim were allowed by *Lord Hardwicke*, who considered the possession of the tenants-lessees to be the possession of the wife; and he observed that the question was of great consequence to husbands, since most of the lands in England were held upon leases, and tenants were backward in paying their rents, and that as a wife might have a *right* for a year or two, or no actual entry made, it would be hard for that reason to prevent a tenancy by the curtesy.

Possession of lessee is the possession of the wife so as entitle her husband to curtesy.

It seems, however, safer to attribute *Lord Hardwicke*'s decree to the circumstance of the possession of the tenants-lessees being the possession of the wife, the consequence of which would be her seisin of the inheritance in tail of the estates, and her husband's title to curtesy. It is true, that the hardship complained of by *Lord Hardwicke* may be unfortunate, but it would, as it seems, be equally hard upon the persons in remainder, or the issue in tail, if their interests were abridged or postponed by the permissive interposition of an estate which for its foundation wanted any of the requisites that the law has prescribed as necessary to make it available.

It has been said, that if lands be given to two sisters, and the heirs of their two bodies, and one marries, has issue, and dies, living the other sister, the husband shall be tenant by the curtesy; upon the principle that the sisters were tenants in common in tail in possession (*a*). But this construction seems to be shaken

No curtesy of lands in joint tenancy.

(*a*) Co. Litt. 30.

by *Littleton*, in section 288; for he says that, if lands be given to two men, and the heirs of their two bodies, they shall be joint tenants during their lives, with several inheritances in tail; and the case of the sisters is mentioned by *Lord Coke*, in his commentary upon that section. If, therefore, the two sisters took interests during their *lives* only in joint tenancy, the husband could not be intitled to curtesy, and with this agrees the case in *Rolle* (*a*).

Contra of lands holden in coparcenary and in common.

Although there can be no curtesy of lands holden in joint tenancy, yet husbands are entitled to curtesy of lands holden by their wives as coparceners or as tenants in common; because their wives have several inheritances, and there is no survivorship amongst them as among joint tenants (*b*).

And the possession of the other parcener or tenant in common will be the possession of the wife, and intitle her husband to curtesy.

Since the possession of one tenant in common is the possession of all the rest, the seisin of the one will be sufficient to intitle the husband of another, a married woman, to be tenant by the curtesy.

Accordingly, in a case where *A* died, leaving a son and a daughter, *A*'s widow *entered* upon an estate in fee of which he died seised, and she was seised of *one part* of it as tenant in dower; of another as *tenant* in *common* with her son; and of the last part as guardian in socage to him. The son went abroad and died under age, by which event the daughter became intitled to his share of the estate, and married. She and her husband applied to the mother to be let into possession of the son's part; but the mother declined, imagining that the son was living, and therefore she held the land for him. During this possession of the mother, the wife died, having had or leaving, as I presume, issue. Resort being had to the Court of Chancery, one of the questions was, whether the *seisin* of the mother after the

---

(*a*) 2 Roll. Abr. 90, pl. 50. See also chap. 9, sect. 2.
(*b*) Litt. sect. 45.

son's death (she being *tenant* in *common* with the daughter) was the *seisin of the daughter* in a sense sufficient to make the husband tenant by the curtesy of the daughter's part of the estate? And the Court adjudged that it was sufficient, upon the principle that the entry and possession of one tenant in common is that of the other (*a*).

The effect of its determination in the husband's lifetime.

It is not necessary that the wife's estate of inheritance should continue during the lifetime of her husband; for whether the issue die *before* her or *afterwards* during the husband's life, still the title to curtesy which commenced on the birth of such issue will continue during the husband's life; because it was a *legal* incident and privilege; and so inseparable from the estate, that it cannot be restrained or prevented by any proviso or condition (*b*). And since the husband's title was *initiate* upon having issue, the law does not permit it to determine afterwards by the death of the issue; that event being the act of God, and within the well-known legal maxim.

Curtesy cannot be prevented by a proviso or condition.

An instance of curtesy after determination of wife's estate.

Thus, a man having issue two daughters, gave lands to the elder and the heirs of her body, with remainder to the younger and the heirs of her body. The elder daughter married, had issue born alive, who died, and then she died. The younger daughter entered upon the husband of the elder, who claimed as tenant by the curtesy. To that claim it was objected, that since the wife's estate was determined, so also must be the estate of her husband, which was derived out of it; and that it could not continue beyond the expiration of the primitive estate. But the Court decided that the husband was intitled to hold the lands during his life as tenant by the curtesy (*c*).

In the last case, it is to be noticed, that after the in-

(*a*) Sterling *v.* Penlington, 7 Vin. Abr. 150, pl. 11.
(*b*) 6 Rep. 41. (*c*) Paine's case, 8 Rep. 67; and see Steadman v. Pulling, 3 Atk. 423, 427; stated *infra* in this section.

heritance of the wife in the thing given ceased, the subject itself still *remained*, and would have passed into the possession of another person, if the law had not interposed the estate by curtesy. But when the thing itself is destroyed or becomes extinct by the determination of the wife's estate in it, then the husband's title to curtesy determines of necessity at the same time. To exemplify this in the instance of rents—

Instances of husband not being so intitled of a *rent* reserved upon an estate tail granted by wife before marriage when the in-tail determines during the marriage.

Suppose a woman, being seised in fee of lands, grant an estate tail, reserving to herself and heirs a *rent*, and then marries and has issue; afterwards the donee in tail dies without issue, whereupon the reversion in fee reverts to the wife; and then the wife dies. Her husband will not be intitled to curtesy of the rent; because, as *Lord Coke* says, the rent newly reserved is by the act of God determined, and no state of it remains (*a*); and it may be added, that the rent necessarily became extinct, because by the death of the donee in tail without issue, there was no person charged with, or obliged to continue the payment of it; and the husband receives no injury, since he will hold the estate in curtesy, if by entry his wife died seised. But suppose the donee in tail had survived the wife, and died without issue before the husband, the husband's curtesy would have ceased, for the rent having become extinct, curtesy could not be continued as in other cases. And with respect to the lands, the wife having been seised during the marriage of a reversion upon an estate tail, curtesy could not attach upon them, as has been before noticed.

If donee in tail survive the wife, and die before the husband, the latter will not enjoy curtesy either of the rent or the estate.

Similiter if the grant had been for the life of the grantee only and the rent reserved to her and her heirs.

So also, if the woman had granted an estate for life only, reserving to herself and her heirs a yearly rent, and such freehold estate continued during the marriage; then it seems that the husband would not be intitled to curtesy either of the rent or the reversion:

(*a*) Co. Litt. 30.

not of the reversion, because it was expectant on an estate of freehold; nor of the rent, as well because it was incident to such reversion, and must go with it to the heir or devisee discharged of curtesy as its principal the reversion was, as also because the rent was not reserved out of an estate of inheritance, but was something in the nature of an interest *pur autre vie*, and could not be considered as a rent in fee (*a*).

But where there is no such necessity as before mentioned, for a rent of which the wife is seised in fee or in tail to become extinct, such rent will fall within the same rule of law which we have seen to be applicable to real estates.

Instances of curtesy where the *rent* determines.

Thus—if a person, seised in fee of a *rent*, grant it in tail to a woman, who marries, and has issue which dies, and then the wife dies, without issue, before her husband, he shall be tenant by the curtesy; because, as *Lord Coke* observes, the rent *remains*; *i. e.* although the wife's inheritance ceased by her death without issue, the reversion in the rent resulted to the grantor, subject to the husband's curtesy, which the law gave as incident to the wife's seisin of the rent in tail, and which did not become extinct of necessity, as in the other case.

The determination, as it seems, would have been the same if the grantor of the rent had not been seised, but had *created* it at the time of the grant. The following extract is added in a note to the case last stated by *Mr. Hargrave*, in his *Coke* upon *Littleton*, from *Lord Hale*'s manuscript:—

"So if it was a rent *de novo* granted in tail, and the wife dies without issue, the husband shall be tenant by the curtesy (*b*)."

This subject will be resumed in the fifth section, which treats of the defeazance of the husband's title by the eviction of the wife's estate.

(*a*) Co. Litt. 32. (*b*) Ibid. 30.

2. *Of seisins in law.*

Seisin in law

The necessity of actual seisin by the wife of the inheritance in such species of property of which seisin in *fact* can be obtained, in order to found a title to curtesy, has been before shown (*a*): but where the inheritances lie in grant, so as to be incapable of the same seisin as lands or tenements, it cannot be required. The law must be satisfied with the *best* seisin of which the nature of the property admits; and it will even dispense with that, when there was no possibility of obtaining it. Instances of which I shall now proceed to produce:—

Sufficient of an advowson or rents.

If a person seised of a rent, or of an advowson in fee, have issue, a married daughter, and dies; and then she, having issue, dies *before* the rent becomes due, or the living becomes vacant, her husband will be intitled to curtesy, notwithstanding his wife had only a *seisin* in *law;* for in the case proposed, *Impotentia excusat legem*, and *actus Dei nulli facit injuriam* (*b*).

It is indeed stated in the 468th section of *Perkins*, that notwithstanding an advowson in gross becomes vacant during the marriage, and the wife die after the six months for presentation have elapsed, and before presentment, &c. so as that the ordinary presents by lapse, the husband shall nevertheless have the next avoidance as tenant by the curtesy. Such position, however, may be reasonably doubted, since seisin by the wife *might* have been obtained by the presentation of herself or husband, and it was owing to their culpable neglect that they lost it. It is obvious, therefore, that neither of the principles upon which actual seisin is excused, viz. *impotentia excusat legem*, or *actus Dei nulli facit injuriam* applies to the case proposed (*c*).

Except there be wilful negligence.

(*a*) Page 7. (*b*) Co. Litt. 29. Perk. sect. 469. Fitz. N. B. 149. D. 2 Br. Tenant by the Curtesy, pl. 2. (*c*) See Co. Litt. 29. a. n. 5.

And except the one be appendant and the other incident to a manor.

If, however, an advowson be *appendant* to a manor, and seisin be not obtained of that manor during the marriage, the above rule of law becomes inapplicable; for as seisin of the principal was necessary to give a title to curtesy, if that be wanting, no such title being deducible to the principal, it must also fail as to adjuncts, or to such things as depend upon or go with the principal.

Thus, if *A* be seised of a manor to which an advowson is *appendant*, and dies, having issue a daughter, who takes a husband, and dies *before entry* into the manor, it seems that the husband shall not be tenant by the curtesy of the advowson, nor of the rents incident to the manor, because he had not seisin of the principal (*a*).

3. *Of seisins in equity.*

In general the same rules as to the wife's seisin prevail at law and in equity.

From the natures of the property before-mentioned to be subject to curtesy (*b*), it appears that such title attaches itself to *equitable* seisins, as well as to legal estates. And it must be noticed, that, in general, legal and equitable interests receive the same constructions, or have the like effects given to them in relation to the present subject, for the purpose of preserving at law and in equity the rules of decision and of property uniform and consistent, so that an *equitable* seisin or estate, which, if *legal*, would have imparted to the husband a title to curtesy, will have the same consequence or effect in equity; except where a strict adherence to the rule would defeat the intentions of the settlers or devisors of the property; instances of which are afterwards stated.

The first instance that I shall mention, is curtesy of a trust-estate—

Curtesy of a trust estate.

A devised his lands to trustees in fee, in trust to pay

(*a*) Note to Co. Litt. 29. Hale's MSS. (*b*) *Supra*, p. 6.

his debts, and to convey the surplus to his daughters equally. The youngest daughter married, and died, leaving an infant son. Question: whether her surviving husband was intitled to curtesy of her share of the surplus lands? And *Lord Cowper*, Ch. decreed in the affirmative, observing, that *trust* estates were to be governed by the same rules as *legal* estates; and that as the husband would have been tenant by the curtesy, had that case been a legal estate, so he should be of that trust estate (*a*).

The following is an instance of curtesy of an equity of redemption—

Of an equity of redemption.

A being seised in fee of lands, mortgaged the inheritance to *B*, and then married *C*. *A*, continuing in the possession of the estate, died, pending the mortgage, leaving a son by her husband. The question was, whether the husband was intitled to curtesy of the equity of redemption? And *Lord Hardwicke*, Ch. decided in his favour, because an equity of redemption was to be considered an *estate* in the land, was transmissible from ancestor to heir, might be granted, intailed, devised, or mortgaged, and might be barred by a common recovery; also, because the person intitled to the equity of redemption is owner of the land, and, therefore, in equity *seised* of the estate; a seisin perfected in the present case by the wife's possession (*b*).

It is worthy of observation, that in the last case the four requisites to tenancy by the curtesy concurred, (*i. e.*) marriage, issue, seisin (*c*), and the wife's death.

(*a*) Watts v. Ball. 1 P. Will. 108. See also 8 Rep. 96.

(*b*) Casborne v. Scarfe, 1 Atk. 603. 7 Vin. Abr. 156. S. C. See the judgment in this case from *Lord Hardwicke*'s MSS. 2 Jac. and Walk. 194.

(*c*) If the lands in which the wife has an equitable estate, be during the coverture in the possession of one claiming the equitable interest adversely, it may be questionable whether the husband would be intitled to curtesy. In Casborne v. Scarfe, *Lord Hardwicke* relies on the actual possession and receipt of the rent and profits,

Of trusts executory.

In equity the rule is, that what is agreed to be done, is considered as actually completed. In consistency with this rule, if money be vested in trustees, by will or otherwise, in trust to purchase lands, with a declaration of trusts which would give the wife an *equitable* estate tail, although the money be not converted into real property during the life of the wife, yet her husband will be intitled to curtesy.

Accordingly, 500*l.* were agreed by marriage-articles to be invested in the purchase of freehold lands of inheritance, to the use of the husband for life, remainder to trustees to preserve, &c. then for all the children of the marriage, as the husband and wife, or the survivor of them, should appoint; and if no appointment, for all the children equally; but if one only, then to such only child in tail, with remainder to the husband in fee. There was but one child of the marriage, a daughter, who married *B*, and had issue. *B* having survived his wife, the question was, whether he was intitled, as tenant by the curtesy, to have the interest of the 500*l.* during his life; which sum was to be considered as land? And *Lord Hardwicke*, Ch. was of opinion that the husband was so intitled; because if the money had been actually invested in land, the wife would have been tenant in tail of the estate, and her husband intitled to curtesy; so also he should be of the money in which she had an equivalent interest (*a*).

---

and in De Grey v. Richardson, in holding that the possession of the tenants was the possession of the wife, he observed that if they had paid the rent to an adverse claimant, it would have been a material objection. 3 Atk. 472. According to the judgment of *Sir W. Grant* in Lord Grenville v. Blyth, 16 Ves. 224, adverse possession under a claim of an equitable title, is not attended with consequences analogous to those of a disseisin at law. But this doctrine must be received with considerable qualifications since the decision in the case of Cholmondeley v. Clinton, 2 Jac. and Walk. 1. 190.

(*a*) Cunningham v. Moody, 1 Ves. sen. 174. S. P. Sweetapple v. Bindon, 2 Vern. 536. Dodson v. Hay, 3 Bro. Ch. Ca. 404.

But when an intention manifestly appears that the husband should have no interest in the estate settled upon his wife, and she is converted into a *feme sole* during her life; in such cases, whether the equitable inheritance devolve to her as heir, or by limitation immediately, or after intermediate limitations, her husband will not be intitled to curtesy. If the trust be executory, *i. e.* to be carried into effect in equity, by directing conveyances or otherwise, the Court will so model the limitations as to prevent curtesy. If the trusts be not executory, still it seems, for the reasons after mentioned, that curtesy cannot be claimed.

Husband excluded from curtesy when he was intended by the settler to take no interest in the property;

and equity in performing articles will order a settlement accordingly.

[Thus in *Bennet* v. *Davis* (*a*), lands were devised to a married woman for her separate use, with a declaration that her husband should not be tenant by the curtesy, but that upon her death the lands should go to her heirs. No trustees were interposed, and therefore the husband having had issue by his wife, became tenant by the curtesy at law; but he was held in equity to be a trustee for the heirs of the wife, and a conveyance to them was decreed].

When, however, the intention to prevent curtesy is not clear, Courts of Equity so far favour the husband's right, that if, from the wife's interest, he is or would be at law intitled to curtesy, they will not disappoint his title. An instance of this occurred in the following case (*b*).

To exclude curtesy the intent must be clear.

A being seised in fee of certain tenements, and having two children, *B* and *C*, by a first husband, agreed by articles made prior to her second marriage with *D*, to give to him, during her life, the interest of her money, and the rents of all her real estates, for maintaining the house and educating their children, until *B* and *C* attained the ages of twenty-one, or married. Upon the happening of either of which events, *B* and *C* were to

Instance when the intent was not sufficiently apparent.

(*a*) 2 P. Will. 316. (*b*) Stcadman v. Pulling, 3 Atk. 423—427.

receive their just proportions of money or estates as should be due to them as lawful heir to their father, *A*'s first husband; but if *A* died before they came to their several fortunes, she reserved to herself the absolute disposition of all her estates and fortunes. *A* having had issue by *D*, her second husband, died, leaving him and *B* and *C* surviving. A question arose, whether *D* was intitled to curtesy of the real estate of which his wife died seised in fee, notwithstanding the articles? And *Lord Hardwicke* determined that he was; observing, that the scope and intent of the articles were only to regulate the whole estate of the wife in right of her first husband, as well the produce of the personal as the rents of the real, for the maintenance of the house and education of their children; and that the words shewed it was intended to comprise the share of the wife's children likewise, until they attained twenty-one; but the estate given to the wife was to determine upon their arriving at that age; that the transaction was nothing more than a contract in what manner the several funds should be applied, of which their estates consisted, and was never intended to abridge or disappoint the legal rights of the husband; therefore there was no reason to deny him curtesy.

[Where the estate is limited in trust for the separate use of the wife for her life, with the equitable remainder or reversion in fee to her, her estate for life unites with the inheritance, so as to vest in her an estate of inheritance in possession (*a*). But there have been different decisions with respect to the husband's right to be tenant by the curtesy in this case.

In *Roberts* v. *Dixwell* (*b*), an estate was devised in trust for the separate use of the wife for her life, with a

---

(*a*) Hearle v. Greenbank, 3 Atk. 697, 716. 1 Ves. sen. 298. Pitt v. Jackson, 2 Bro. C. C. 51. Fearne Cont. Rem. 55. Morgan v. Morgan, 5 Madd. 408. (*b*) 1 Atk. 607.

direction that she alone or such persons as she should appoint should receive the rents and profits, and that the husband should not intermeddle therewith, and after her decease in trust for the heirs of her body for ever. One question was, whether the husband was intitled to curtesy in this estate, and against this claim it was argued that the husband could not be tenant by the curtesy unless he could shew a seisin in himself in right of his wife, and that his right must be initiate in the lifetime of the wife. But *Lord Hardwicke* said, that as a trust estate would not bar the husband of his tenancy by the curtesy, the question was, Whether the devise to the wife, being for her separate use, would bar him? He was of opinion that it would not, because there was a sort of seisin in the wife, and though *Lord Coke* had said, that in order to make a tenancy by the curtesy, there ought to be a right in the husband inchoate in the life of the wife, he had not said that the husband should be seised of the rents and profits. His Lordship therefore thought, that if there had been an estate tail in the wife, the husband would have been intitled to be tenant by the curtesy, though the Court would have prevented him from intermeddling with the rents and profits during her life. The case was, however, decided upon other grounds: it was held that the wife took only an estate for life, and consequently that the husband was not intitled.

In the subsequent case of *Hearle* v. *Greenbank* (*a*), the testator devised his estates to trustees and their heirs for the separate use of his only daughter (a married woman) for life, and upon trust to permit her by any deed or writing to give, devise, and bequeath the estates as she should think fit. The wife died having had issue, and an appointment made by her under the power having been held void on the ground of her in-

(*a*) 3 Atk. 696, 1 Ves. sen. 298.

fancy, it became a question whether her husband was intitled to be tenant by the curtesy. *Lord Hardwicke* said, that as the reversion in fee descended upon the wife till the execution of the power, she had the inheritance; but the father had made her a *feme sole*, and had given the profits to her separate use: what seisin then could the husband have during the coverture? He could neither come at the possession nor the profits. There was no equitable seisin of the husband; and to admit there was, would be directly contrary to the father's intention: and therefore neither in law nor equity was the husband tenant by the curtesy.

The point was considered in a late case (*a*), where an estate was by marriage settlement conveyed to trustees in fee, upon trust for the separate use of the wife for life, with power to her to appoint the fee by deed or will; and for want of appointment, in trust for her, her heirs and assigns. There was issue of the marriage, and the wife died without having made any appointment, leaving her husband surviving; and a question arose as to his right to curtesy. The Vice Chancellor in giving judgment, observed that the cases of *Hearle* v. *Greenbank*, and *Roberts* v. *Dixwell*, could not be reconciled, and that between the conflicting opinions of *Lord Hardwicke*, recourse must be had to principle and analogy. The husband was entitled to be tenant by the curtesy wherever the wife, during the coverture, was in possession of an equitable estate of inheritance, and had issue by the husband capable of that inheritance. There was no doubt here that the wife had an equitable estate of inheritance, and the husband must therefore be entitled to curtesy, unless it could be held that the direction that the wife should take the profits for her separate use amounted to an express intention to exclude him. He might in equity be wholly excluded

---

(*a*) Morgan v. Morgan, 5 Madd. 408.

from the enjoyment of his wife's property, by a direction that he should not be tenant by the curtesy, as in *Bennet* v. *Davis* (*a*). Here he was only partially excluded. The court would, according to the intention of the settlement, have restrained him from interference with the rents and profits during the life of the wife; but there being no further exclusion expressed in the settlement, the court had no authority to restrain him from the enjoyment of his general right as tenant by the curtesy in the equitable inheritance of the wife].

When the wife and her husband take property under a will, and an estate tail to which she is intitled is disposed of by it, so as to put her to an election between her own estate and the testamentary disposition; if she choose her own estate, and give up the bequest, made in her favour (*b*), her husband will not be obliged to elect between his title, as tenant by the curtesy of the estate tail, and the bequests given to him by the will; the reasons for which appear from the case of *Cavan* v. *Pulteny* (*c*). Election.

A was tenant for life, with a leasing power, remainder to his son in tail, with such limitations over as to vest in *B*, wife of *C*, an estate tail. *A* made leases not pursuant to the power. *A* erroneously supposing that, by acts done by himself and son, he had a power by will absolutely to appoint the intailed estates, devised them, after surviving his son, to *B* in strict settlement, remainder to *D* in like manner; and after some bequests in favour of *B* and *C*, he made *D* residuary legatee. *B* elected her estate tail, and renounced all benefits under the will. *C*, her husband, accepted the provisions made by it for him; and the following points were decided:—That by *B*'s election to take her estate tail, *C*, her husband, was intitled to curtesy;—that *C* was Instance of husband not put to election between curtesy and benefits given him by will.

(*a*) 2 P. Will. 316, *supra*, p. 21. (*b*) For the doctrine of Election, see *infra*, chap. 11, sect. 3, pl. 4. (*c*) 2 Ves. jun. 545. 3 Ves. 384.. See p. 386.

not put to his election between what he took under the will and his curtesy, because he was to be considered as a stranger, and was intitled to curtesy as a continuation of his wife's estate, for which, in consequence of her election, she had made compensation to the devisees, by such renunciation as above; and that the remedies of the lessees were against the testator's assets under the covenants in their leases (*a*).

Effect of the election of wife tenant in tail upon her husband's title to curtesy and the issue in tail.

It is however to be inferred from the judgment delivered in the last case, that if *B* had elected to take under the will, her election, although tenant in tail only of her own estate, would have bound her husband's

---

Election as applied to interests derived from estates taken against the will.

(*a*) In this case, the circumstance that compensation had already been made to the disappointed devisees, was a sufficient answer to their claims; but the judgment of Lord Rosslyn furnishes this principle—that a person who takes a derivative interest, emanating from an estate held in opposition to the will, may nevertheless accept benefits under it. See 3 Ves. 386. This principle is supported by the case of White v. White, 2 Dick. 522; where the testator, by a will, purporting to devise a settled estate, gave a legacy to his nephew. The estate vested in the testator's brother, and on his death descended to the nephew, as issue in tail; and he was held entitled to take both the legacy and the estate. He was not bound to elect at the testator's death; and the estate coming to him subsequently by a title paramount, did not alter his rights. This decision was recognized in Highway v. Banner, 1 Bro. C. C. 584, where the distinction is pointed out between the situation of the issue in tail, and of remaindermen in this respect; the latter taking distinct interests by separate rights, elect separately. Wilson v. Townshend, 2 Ves. jun. 693; and see Ward v. Baugh, 4 Ves. 623.

In Noyes v. Mordaunt, 2 Vern. 581. Gilb. Eq. Rep. 2. the defendant Elizabeth claimed, as tenant in tail, against the will of her father, a moiety of a settled estate. One third of that moiety vested in her on the death of her sister Mary, to whom it had descended from the father. The defendant was put to her election as to the whole moiety; and the case may therefore, at first sight, appear to militate against the principle alluded to above. But it is necessary to attend to the circumstance that the defendant also inherited from her sister Mary a portion of another estate, devised to her by the father; and this descended to the defendant, subject to the same obligation to elect which attached upon it in the hands of Mary.

right to curtesy, and the interest of the issue in tail, upon the principle that their estates being derived from her who had an absolute right of property, were in her power, or, as expressed in the judgment, "*C*'s interest was totally in *B*, his wife's power; the whole estate being in her, her election, if to take under the will, enabling her to dispose of the whole estate tail:" so that after *B*'s death her husband or the issue in tail would not, according to this doctrine, be permitted to claim the intailed estate, and prevent it from continuing under the limitations in the will. It was not, however, necessary to decide either of the above questions, as the wife elected to take her own estate tail, and to relinquish all benefits under the will. In the case of *Long* v. *Long* (*a*) the question whether the election of tenant in tail could bar the issue arose, but was not necessary to be decided, and the Court observed that the point admitted of much argument (*b*). It is however presumed, that as without fine or recovery the rights of the issue in tail cannot be barred, and it would be unreasonable to take away the husband's title to curtesy without his concurrence, the mere election *in pais* of the wife to give up her estate tail will neither

---

(*a*) 5 Ves. 447.

(*b*) As the issue in tail take without being subject to equities arising from acts of the ancestor subsequent to the creation of the estate tail (2 Ves. sen. 634), it seems difficult to contend, that a tenant in tail can bind his issue by electing to give up the estate, unless his election is carried into effect by a fine or other assurance barring the entail. In Highway v. Banner, 1 Bro. C. C. 586. where it was argued that tenant in tail of a copyhold had made a conclusive election, the argument was founded on the supposition of his having barred the estate tail by a surrender; and the question was considered in the same light in Roundell v. Currer, 2 Bro. C. C. 67. 1 Swan, 383, *n*. If, however, the benefits given by the will, which impose on the tenant in tail the necessity of election, happen also to devolve upon the issue in tail, the latter would of course be bound to elect, as in Noyes v. Mordaunt, *supra*. Effect of election by tenant in tail.

bind her husband's right to curtesy, nor the interest of the issue in tail (*a*).

Mode of election by feme covert in a suit.

(*a*) In the cases in which married women have been decreed to elect, there has been much variety of practice, as to the mode in which their election is to be declared. The cases are collected by Mr. Swanston, in one of the able and learned notes on the subject of election, in the first volume of his Reports, p. 415. Sometimes the election of the married woman has been made upon a personal examination in court, or before commissioners appointed for the purpose. Parsons v. Dunn, 2 Ves. 61. Ward v. Baugh, 4 Ves. 623. In one case, she was ordered to signify her election by signing the registrar's book, by her clerk in court, within a limited time. Pulteney v. Darlington, 7 Bro. P. C. ed. Toml. 546. 547. 1 Swan. 416; and in another to make her election before the master within six months. Vane v. Lord Dungannon, 2 Sch. and Lef. 133.

In other cases it has been referred to the master to inquire what election would be most beneficial for the married woman. Wilson v. Townshend, 2 Ves. jun. 693; and see 9 Ves. 350. This course was adopted in Pulteney v. Darlington, when she had failed to comply with the order for electing through the medium of her clerk in court.

It has been said (2 Ves. sen. 61. 2 Ves. jun. 560) that a reference to the master is the proper course, in case of the husband and wife disagreeing as to the election: a supposition inconsistent with the other cases, which appear to treat the election as the sole act of the wife.

In Wilson v. Townshend, *ub. sup.* the value of the funds appearing on the pleadings, the court being itself able to judge what would be most for her benefit, determined her election without a reference. That case is singular in some of its circumstances:—The court, in considering which election would be most beneficial to the wife, appears to have been influenced only by the comparative value of the funds, without regard to the circumstance that one of them was given to her separate use, and dismissed her bill without allowing her an option to accept that provision.

In Wright v. Rutter, 2 Ves. jun. 673, 4 Ves. 535, Brodie v. Barry, 2 Ves. and B. 127, Reg. Lib. A. 1812, fol. 1437, and Bradish v. Bradish, 2 Ball and B. 491, it does not appear in what particular mode the election was to be signified.

The election of a feme covert may also in some cases be determined by other acts besides an express election made in a suit for that purpose. In Stratford v. Powell, 1 Ball and B. 1. 24, a widow bound

III. **With respect to the *issue* to be born, in order to intitle the husband to be tenant by the curtesy :—**

They must be born *alive during* the marriage; any proof of which circumstance will be received and sub-

The birth of what issue necessary to intitle the husband to curtesy.

---

to elect under her husband's will, by settlement on a second marriage, reserved her property to her separate use; and it was held that acts done by her during her second coverture fixed her election. In Ardesoife v. Bennet, 2 Dick. 463, a married woman was entitled to an estate which was attempted to be devised away by a will, giving to her separate use a legacy of much greater value: she received the interest of the legacy, and was held to have thereby made an election, binding on her heir.

What acts *in pais* constitute an election by a feme covert.

In cases of real estates, if she joined her husband in selling part of one of them, it would seem that this must be held to be a conclusive election. The decree in Brodie v. Barry, *ub. sup.* declared that the heiress of the testator's heritable estates in Scotland was bound to elect, if she had not already elected; and with a view to the latter point, directed an inquiry whether she and her husband had sold any, and what parts of the heritable estates, or whether they had done any other acts in respect thereof. See also Lewis v. King, 2 Bro. C. C. 600.

Where neither of the funds is given to her separate use, it may be presumed, upon general principles, that acts *in pais*, done while under the disability of coverture, will not constitute an election. See Oldham v. Hughes, 2 Atk. 452, Cunningham v. Moody, 2 Ves. sen. 170. Where one of the funds only is given to her separate use, Ardesoife v. Bennet, *ub. sup.* is an authority in favour of her capacity to elect by acts done out of court: but that case turned partly on the value of the property. On this point see Wilson v. Townshend, *ub. sup.*

In case of the wife dying without having made a conclusive election, it has been intimated that it might be determined by a reference to inquire which would have been most for her advantage. 2 Ball and B. 25.

Effect of the wife's election on the husband's interests.

When the interests or inclinations of the husband and wife on the subject of election happen to be at variance, a question arises how far an election made by the wife, or by the court, or the master on her behalf, can affect the marital rights of the husband in the property relinquished. Some discussion on this question appears to have taken place in Pulteney v. Darlington: that case ended in a sort of compromise, (see 2 Ves. jun. 560,) but the opinion of Lord Chief Justice De Grey, cited in the text, and the form of the decree, imply

Must be born alive during the marriage,

mitted to a jury; but if, by the death of the wife in childbed, it be necessary to resort to the *Cæsarean* operation, it is said that the birth of such child will not intitle the husband to curtesy; because the issue was not born during the coverture, or the wife's life, and the land descended in the mean time, and the estate of tenant by the curtesy ought to take away the immediate descent; and in pleading, it is necessary for

---

that the husband's interest is bound by the election made by the wife, or on her behalf. In Parsons v. Dunn, and Bradish v. Bradish, (cases relating to personal estate) the question appears to have been considered in the same way. In Vane v. Lord Dungannon, where the property taken under the will was real estate, the decree was framed upon this principle, which seems also to be favoured by the cases of Ardesoife v. Bennett, and Wilson v. Townshend. On the other hand, in Brodie v. Barry, where the wife was put to elect between a bequest to her separate use and heritable estates descended, it was taken to be clear that the husband's marital right in the latter could not be prejudiced by her election.

A distinction may perhaps prevail on this point between those cases where the property, proposed to be relinquished by the wife, consists of a legacy or a trust fund of a personal nature, and those where it consists of real estate. In the former cases the husband has not an absolute right in the property; his interest in it is subject to the controul of a court of equity, which has authority to apply a part of the fund, or even the whole, in such a manner as circumstances may render most beneficial to the wife and her children. But in the latter cases, the marital right, which the law confers on him, is not subject to any equitable qualifications. It being settled that election is not a legal doctrine (Harford v. Dillon, 2 Brod. and Bing. 12, See. 1. Swan, 430, *n.*), and the wife alone having no power to convey or to waive the estate, her election to relinquish it cannot be carried into effect without his concurrence; and it does not appear upon what principle that election could authorize a court of equity to compel him to convey away the legal interest vested in him.

It may be remarked that the husband may disagree to or waive an estate acquired by his wife, Co. Litt. 3, *a.* Vin. Ab. Disagreement, pl. 6, 22. How far the exercise of this legal power is controllable in equity, is a question which does not appear to have arisen.

him to allege, that *he had issue during the marriage*, which in this case he cannot do (*a*).

and be capable of inheriting the wife's estate, and must take it by descent.

The issue, when born alive, must be inheritable to the estate from the mother, either immediately or by possibility.

Accordingly, if, before the statute of *Westminster the* 2d (*b*), lands had been given to husband and wife, and the heirs of their two bodies, and the husband died *after* issue born, and then the wife, continuing seised of such estate, took another husband, and after having issue by him also died; the second husband would have been tenant by the curtesy, and for this reason: the feme-donee, after birth of issue, was considered by the common law as acquiring by that event an estate of inheritance capable of disposition and forfeiture, and transmissible to her lineal descendants *in infinitum*; for as she might have substituted strangers to be absolute owners of the estate by express alienation, so all the lineal heirs of her body which she might ever have, were, by construction of law, intitled to inherit to her, after the birth of the first inheritable child, as a benefit and incident *tacite* annexed to her estate (*c*); consequently, the second husband, in the case proposed, was

---

(*a*) 8 Co. 69. Co. Litt. 29, *b*. This question would perhaps at this day receive a different decision, a child in *ventre sa mere* being now considered *in esse*, not only for its own benefit, but for other purposes. Woodford v. Thelluson, 4 Ves. 323, 334. And as they are held to be included under the description of children born (Whitelock v. Haddon, 1 Bos. and Pull. 243. Trower v. Butts, 1 Sim. and Stu. 181), the husband might perhaps allege in pleading that he had issue born during the marriage. One of the difficulties, however, stated by Lord Coke (if it can be considered substantial), still exists. The estate, during the short interval after the death of the wife, descends to her next heir, and is not divested *ab initio* by the subsequent birth of the child. Basset v. Basset, 3 Atk. 207. Goodtitle v. Newman, 3 Wils. 516. 4 Ves. 335.

(*b*) De Don. Cond. 13. Edw. 1, c. 1. (*c*) Perk. sect. 465. 8 Rep. 35, *b*. Co. Litt. 19.

So that the issue of second marriage of wife, she and her first husband being donees in tail, will not intitle second husband to curtesy.

intitled to be tenant by the curtesy. But the law has been altered by the above statute, so that if a married woman, *donee* in *special* tail, have issue by one husband, and afterwards issue by another, and then dies during the life of the second husband, he will not be intitled to curtesy; because the children of the last marriage *cannot* by possibility inherit the wife's estate. Again:

Nor if wife be donee in tail general, and she and first husband levy a fine and retake an estate in special tail.

Suppose a wife, tenant in tail general, and her husband levy a *fine*, and retake an estate to them and the *heirs of their two bodies*, and have issue, and then the husband dies, and his widow marries again, and has issue, and dies, after which the second husband claims curtesy upon the supposed *remitter* of his wife to her *first* estate in *tail general;* it seems that such claim cannot be allowed, for as the wife is *estopped* by the *fine* from claiming her first or old estate, so is the second husband, who must derive his title from her; this being so, and since the issue of the second marriage never could by possibility inherit, from the wife, the estate taken back and settled in special tail upon the issue of the *first* marriage, the second husband's title to curtesy must be defective and fail (*a*).

But if she be seised in fee before second marriage, although there be issue of the first, her second husband on birth of issue shall have curtesy.

But if a single woman, seised of lands in fee simple, marry, have issue, and her husband dies; and she, being so seised, take a second, has issue by him, and then dies, living the issue of the first husband, the second husband shall be tenant by the curtesy, *causa patet* (*b*). Again—

If the wife be seised in tail *female*, birth of a son will not give a title to curtesy.

If land be given to a woman, and the heirs *male* of her body, and she have issue only a *daughter*, and die; or if the limitation be to her and the heirs *female* of her body, and she have issue only a *son;* in neither of these cases can the husband claim curtesy, because in

---

(*a*) 2 Bro. Tenant per le Curtesy, 1. (*b*) Bro. Curtesy, 8. Perk. sect. 466.

neither of them was there issue born who could by possibility inherit the estates (*a*).

Also if the issue be intitled as purchasers, curtesy will not attach.

For the same reason, if the issue claim by *purchase* and not by descent, the husband's title to curtesy will be defective.

Thus, *A* devised to *B*, a married woman, lands in fee simple; but if *B* died before her husband, he then gave such husband 20*l.* a year for life; with remainder, as to the lands, to *B*'s children. *B* died before her husband leaving children; and it was adjudged, that the husband was not intitled to curtesy; because the issue *did* not claim from the wife by descent, but under the will as *purchasers* (*b*).

There is an exception to the rule which requires heritable issue to be born during the marriage.

Gavelkind.

By the custom of *gavelkind*, a husband may be tenant by the curtesy without having issue by the wife (*c*); but this custom is not so beneficial as the common law right; for tenant by the curtesy under the custom is intitled to a *moiety* of the wife's estate only, and which ceases or is forfeited by his *second* marriage (*d*).

Instance of title by curtesy when there never was issue.

Birth of issue at any time during the marriage sufficient;

To intitle the husband to curtesy, it is sufficient if the issue be born at any period during the marriage; and for this purpose it is immaterial whether they come into existence *before* the seisin of the wife or *afterwards* (*e*). Accordingly—

and although they die before the descent of the estate upon the wife.

If husband and wife have issue, and the issue die, and then lands of inheritance descend to the wife, of which she actually becomes seised by entry; in that case the husband upon his wife's death will be intitled to curtesy (*f*).

Circumstances under which the time of birth of an heritable issue is material.

But the time of having issue may be material in some instances, in regard to the husband's title to

---

(*a*) Co. Litt. 29, *b*. (*b*) Sumner v. Partridge, 2 Atk. 47. (*c*) Co. Litt. 30. Dav. 50. 2 Sid. 153. (*d*) Rob. Gavelk. b. 2, chap. 1. (*e*) Co. Litt. 29, *b*. (*f*) Perk. sect. 473.

curtesy, as it has been observed, and will afterwards appear (*a*).

Husband's feoffment *after* issue good for his life.

Thus, if the husband, *after* having issue, make a feoffment in fee, and then the wife dies, the feoffee shall hold the land during the husband's life; because, by the birth of issue, he was intitled to curtesy; which beneficial interest passed by the feoffment (*b*); but if the feoffment had been *conditional*, and the husband entered for a breach, and then the wife had died, his right to curtesy would have been extinct (*c*); because, as it seems, the feoffment being the *tortious* act of the husband, although the law considers it, in regard to the feoffee, as a conveyance of the actual interest of the wrong-doer, yet with respect to himself, the law makes it to operate as an extinction of his right; and necessarily so, since by the re-entry he did not take back an estate in right of his wife, but the possession of the wrongful estate created by the discontinuance.

But as to himself, if it were *conditional*, and the condition broken, the feoffment would be an extinguishment of his right.

Also his feoffment *before* issue born will extinguish his right to curtesy, although he take back such an estate as to remit his wife to her first estate.

But suppose the husband to aliene by feoffment his wife's estate of inheritance *before* issue born, and to retake an estate in the lands to himself and wife, so that the latter is remitted to her ancient or former estate, and then they have issue; the husband will not be intitled to curtesy, although his right to it had no existence when the feoffment was made, but which would have accrued afterwards upon his birth of the issue, if no feoffment had been made (*d*); for the husband, by his tortious discontinuance of the wife's estate, extinguished all his then present and future rights, in the face of which the law will not allow him to derive any benefit from his wife's remitter to her former or ancient inheritance (*e*).

(*a*) Sect. 5, pl. 3 and 4. (*b*) Co. Litt. 30. (*c*) Co. Litt. 30, *b*. But it is otherwise if the feoffment be before issue had. Perk. 474. (*d*) 2 Bro. Tenant per le Curtesy, 6. 7 Vin. Abr. 162, pl. 2. Hob. 338. (*e*) The reader will find the doctrine of Remitter considered in chapter II. sect. 3.

The next thing proposed to be considered was—

IV. The nature of the estate of tenant by the curtesy, with the incidents, privileges, and powers belonging to, and his liability in respect of it. Nature of the estate.

1. It was noticed in the beginning of this chapter, that the interest of tenant by the curtesy is an estate to continue during his life (*a*). An estate for life.

He, as other tenants for life, is intitled to emblements, and may dispose of them by his will; or, if he make no such disposition, they will belong to his executor or administrator (*b*). Tenant intitled to emblements,

He is equally privileged with tenant in dower, in regard to the interference of a Court of Equity, for the removal of a satisfied term of years, which would prejudice his estate in a Court of Law; and whether such term be outstanding or assigned to attend the inheritance of the estate, will make no difference (*c*). and to the removal of an outstanding satisfied term.

But an estate by curtesy is considered in many respects as a continuation of the estate of the wife. The consequence is, that her husband takes it after her death, with all the incumbrances which would affect it in her possession if she were living. Curtesy a continuation of wife's estate,

Accordingly, a woman tenant in tail acknowledged a statute, then married, had issue, and died. It was adjudged, as *Noy* says, that the lands might be extended in the hands of tenant by the curtesy; and even of the issue in tail, during the life of the tenant by the curtesy, if he surrender his life-estate (*d*). and liable to her incumbrances.

But the interest of tenant by the curtesy being merely for his life, as we have seen, he, as every other tenant for life, will be obliged in equity, at the instance of the owner of the inheritance, to keep down the interest of the charges upon the estate (*e*). Tenant must keep down the interest.

(*a*) *Supra*, p. 5. (*b*) 2 Black. Com. 122; and see chap. 9, sect. 4. (*c*) Snell v. Clay, 2 Vern. 324; and for further information on this subject, see chap. 11, sect. 2. (*d*) Dyer, 51, *b*. Note 17. (*e*) 1 Atk. 606.

And is intitled to his wife's turn of presentation to a living, though she be dead.

Another consequence of the interest of tenant by the curtesy being considered a continuation of his wife's estate is,—that if there be coparceners of an advowson, and the wife is the eldest parcener, and they cannot agree to present; the eldest being intitled to the first turn, if she die before its arrival, her husband, in respect of the estate which he enjoys in her right by the curtesy, will be intitled to the presentation in the same manner as she would have been had she been then living (*a*).

Liable to a writ of partition,

So also a writ of partition, by the common law, lies against tenant by the curtesy, which could not be the case unless his estate were considered a continuation of that of his wife (*b*). But since he is not strictly a parcener, he could not have that writ by the common law, for it lay only for coparceners; however, by the statute of the 32d of Henry the eighth (*c*), he or his alienee may now have the writ (*d*).

and may issue it.

Liable to waste.

The estate by curtesy is not dispunishable of waste; and such is the privity between tenant by the curtesy and the heir, that, according to the common law, if both of them had conveyed away their estates, no action of waste could have been supported against such tenant, except by the heir; but by the statute of *Gloucester* (*e*), remedy is given to the grantee of the reversion, against tenant by the curtesy, so long as that estate continues, and afterwards against his alienee. Yet, whilst the heir does not part with his reversion, tenant by the curtesy remains liable to an action of waste, at the suit of the heir, although such tenant may have assigned his interest before the waste was committed; because that case is not provided for by the statute, and the common law continues unaltered (*f*).

Privity between him and the heir.

Action of waste.

(*a*) Co. Litt. 166, *b*. Cro. Eliz. 19. (*b*) Co. Litt. 175.
(*c*) Chap. 32. (*d*) Co. Litt. 175, *b*. (*e*) 6 Edw. 1, chap. 5.
(*f*) 3 Rep. 23, *b*. Fitz. Nat. Brev. 56.

With respect to waste committed by tenant by the curtesy, and his liability for *permissive* waste, he stands in the same situation as tenant in dower. The subject is particularly discussed under title "Dower," to which the reader is referred (*a*).

2. Tenant by the curtesy having but a freehold interest in his wife's estate, cannot lawfully dispose of it for a longer period than during his life. As incident to that estate, he may, after his wife's death, grant leases *for years* of the property, which will continue so long as he lives. With his life, however, they will so completely expire as to be incapable of being revived or confirmed by the acceptance of rent, &c. (*b*).

May grant leases for years,

If the estate holden in curtesy be a manor, tenant by the curtesy is Lord of it *pro-tempore*; he may, therefore, grant the lands, holden of it, by copy of court-roll, at the ancient rents and services, and pursuant to the custom; and such grants will bind the owner of the inheritance (*c*).

and, as *dominus pro-tempore*, grant by copy of court-roll.

Upon the whole, whatever a dowress, or other mere tenant for life, may do, either as to passing or charging their respective interests, so also may a tenant by the curtesy.

I shall now proceed to consider—

V. How curtesy may be defeated and barred.

1. It will be defeated by the recovery of the estate by a stranger under a good prior title.

In addition to the instances which have been before necessarily mentioned in the second section, in which the seisin of the wife was considered, it is to be observed, that if the possession of the wife be defeated by the birth and entry of her brother, a *posthumous* son, the title of the husband to curtesy must fail. Yet if the brother die without issue *before* the wife, and the

Curtesy defeated by birth of a posthumous son.

(*a*) Chap. 9. sect. 4. (*b*) Miller v. Mainwaring, Cro. Car. 398. (*c*) 4 Rep. 23, *b.*; see also *infra*, chap. 9, sect. 4.

husband re-enter during the marriage, this will revive his right to curtesy (*a*).

By entry of donor for breach of a condition.

If the wife's seisin be defeasible by a *condition* annexed to the grant, and the condition be broken, and the donor enters, the husband's right to curtesy will be defeated; because the donor resumes his *original* and *former* estate; by which resumption, the seisin of the wife is the same as if it had never existed; it being, by the donor's re-entry, defeated *ab origine*, with all the rights, charges, and incumbrances, attaching to it before the condition was broken.

Thus, if an estate were given to a married woman in fee, upon condition that in case she did not pay to *B* 1000*l.* within five years, the donor might enter; if she do not pay the money, and entry is made, the donor becomes seised of his estate, as if such grant had never been made, and the wife's possession being thus defeated as if it had never commenced, there is no seisin upon which the husband can found a claim to curtesy.

Whether curtesy defeated when the wife's estate determines by limitation; and the distinction between condition and limitation.

But it is not so of a *limitation*; that has no retrospective operation or effect, it merely shifts the estate from one person to another, leaving the prior seisin undisturbed; and whenever an estate is given over to a stranger, whether expressed by the word condition or not, the disposition over upon non-compliance with the terms of the gift by the first donee is a limitation; for since the donor or his representatives only can take advantage of a condition, it would be in their power to disappoint the disposition over, by refusing to enter for a breach, if it were not considered a limitation, according to which, when the estate of the first donee determines, the one next limited commences, and the person intitled may enter upon the lands the instant that the failure happens (*b*).

(*a*) 2 Bro. Curtesy, fo. 249, *b*. pl. 13. (*b*) 2 Black. Com. 155.

This introduces the consideration of a distinction (*a*), which has been alluded to as prevailing on the subject of curtesy, viz. that where, in its creation, the wife's estate of inheritance is not made determinable sooner than by its natural expiration, *i. e.* upon a failure of issue or heirs, the husband will be intitled to curtesy, although such estate expires upon the wife's death without leaving issue; but that where the fee is originally devised or limited in words importing a fee simple or fee tail, absolute or unconditional, but by *subsequent* words it is made determinable upon a particular event independently of its natural expiration, if, in that case, the event happen, the husband's curtesy will cease with the estate to which it is annexed; so that if a grant were made to the wife in fee simple or fee tail of lands, whilst, or so long as *A* had heirs of his body, or until *B* attained twenty-one, and then to *B* in fee; if *A* died without issue, or if *B* attained twenty-one; then since the wife's estate became determined by express limitation, the husband's curtesy would not, according to such distinction, be continued, as it would have been if the estate had been given to the wife and to her heirs, or to the heirs of her body without the annexation of either of the defeating or determining clauses, and the wife's interest had naturally ceased by her death, without leaving issue.

The above distinction, in regard to the two limitations, is subtle, and may be considered unsatisfactory. In instances of conditions, the reasons for denying the husband curtesy are clear, and have been before stated; but why the husband should not be intitled to curtesy equally upon a limitation to his wife in tail, determinable upon the event of *A* attaining twenty-one, and then to *A* in fee, as he would be if there had been no such determining event tacked to the wife's estate, and she

---

(*a*) On this question see *post*, chap. 9, sect. 2.

died without leaving issue before him, is not so clear, upon reference to the principles of the decisions in other cases.

It is admitted that *both* limitations have defeating clauses attached to them; the one the contingency of *A* attaining twenty-one, the other an implied condition in favour of the donor and his heirs, upon non-alienation and failure of the issue of the donee; whence it might be urged with some plausibility, that as the latter of the two limitations is strictly *conditional*, the entry of the donor, upon failure of issue, would, as in other cases of conditions, defeat the curtesy of the husband; yet we have seen that in this instance the husband's right to curtesy has been settled and adjudged; but with respect to the former of the two limitations, since it is *not* conditional in the legal sense of the word, but a *limitation*, which does not disturb the prior seisin of the wife, or the *initiate* title of the husband to curtesy, it may be asked, why should not the law in this instance, as in the other cases before mentioned, continue that seisin for the *completion* of the husband's title, as tenant by the curtesy? I know of no case containing an express decision to the contrary; and the inferential reasoning is not correct, that because the incidents or consequences flowing from the two limitations differ in some respects, they must, therefore, differ in all. These two limitations do indeed agree in one particular; they do not disturb the seisin which the wife had previous to the happening of the events which determined her estate; so that all the authorities applicable to show the continuance by the law of the wife's estate for the curtesy of the husband after her estate determined by a failure of issue, apply also to the other limitation above described. The cases which have been supposed to authorise the distinction between the different effects of the two limitations in regard to curtesy do not appear to have been determined upon that point. It is

true that in *Boothby* v. *Vernon*(*a*), before mentioned, the court said, that wherever the wife's estate was to determine by express limitation or condition *upon her death*, curtesy did not attach, but that *dictum* must be considered in relation to the facts of the case, and then it would mean no more than this, that where the wife had a life estate only by express limitation, with the reversion in fee, subject to a contingent remainder in tail to her issue male, if she left any; the reversion being executed in her *sub modo* only, (*i. e.* to separate from the particular estate, as if they had never been united, upon the contingency happening); if the wife leave a son at her death (as she did in *Boothby* v. *Vernon*), she was to be considered as having been seised of an estate for life only during the marriage, which estate having determined by express limitation at her death, her husband could not make a title to curtesy(*b*). And with respect to the case in *Leonard*(*c*), *A* covenanted to stand seised to the use of *B*, her eldest daughter in tail, upon condition that *B* should pay to her sister *C*, within a year after *A*'s death, or within a year after *C* should attain the age of eighteen, the sum of 300*l.*; and if *B* failed to make such payment as aforesaid, then to the use of *C* in tail. *B*, after *A*'s death, married, had issue, and died without leaving issue before the period arrived for payment of the 300*l.* Question, whether her husband should have curtesy? And the court decided in his favour, upon the ground, that as the estate tail in *B* determined by her death without issue, her husband, as settled in such cases, was intitled to curtesy. Such alone was the point

---

(*a*) 9 Mod. 147, and stated *infra*, chap. 9, sect. 2, pl. 4.
(*b*) See *ante*, p. 9, and chap. 9, sect. 2, pl. 4.
(*c*) Sammes v. Paynes, 1 Leon. 167.

expressly determined. And in *Flavell* v. *Ventrice*(*a*), a case of dower, no decision appears to have been made, the opinions of the four judges having been equally divided. Consider, then, this question upon reason and principle. It is settled that in every case, where a man takes a wife seised of such an estate in lands, as that the issue which she has by him might by *possibility* inherit them as heir to her, he shall, after her death, hold the lands for his life as tenant by the curtesy; if, therefore, at any time during the marriage, the wife is seised of the inheritance, and have heritable issue, it seems to be a necessary consequence, that whether her estate determine by the death of such issue, or by any event, *subsequent* to such seisin, attached to such estate, where it is not avoided *ab initio*, the inchoate right to curtesy shall not be defeated by either of those events taking place. Besides, the husband's title to curtesy is not merely derived out of, or dependant upon his wife's estate, but it is created by law, it is a privilege and benefit of law annexed to the gift, and the law, as I conceive, says, that as the estate *remains*(*b*), and the husband's right to curtesy once attached to it, such right shall be a charge upon the estate, into whose possession soever it may afterwards come during the marriage. In this respect curtesy and dower are governed by the same principle. The very case in question was put by *Anderson*, J. in the case of *Sammes* v. *Paynes*, before referred to, viz. that if a feoffment were made to the use of *J. S.* and his heirs, *until J. D.* had done such a thing, and then to the use of *J. D.* and his heirs, and the thing was done, and then *J. S.* died, the wife of *J. S.* should be endowed. This appears to have been admitted in *Doe* v. *Hutton*(*c*); and the above

---

(*a*) Roll. Abr. 676. Goldsb. 81. (*b*) See pp. 14, 15.
(*c*) 3 Bosanq. and Pull. Rep. C. P. 652.

observations seem to be supported by the authority reported in a note to the case last referred to:—Devise to trustees and their heirs, to receive the rents and profits of an estate, and apply them for the maintenance of *Mary Barnes*, until she arrived at the age of twenty-one, or until she married, and upon her arrival at that age, or *marrying*, to the use of *Mary Barnes* in fee; but *in case she died before the age of twenty-one, and without leaving issue*, remainder over. *Mary* married, and had a child, which died, and then *she died under the age of twenty-one.* Question, whether *Mary's* husband was intitled to be tenant by the curtesy? And *Lord Mansfield* and the other judges decided in favour of the husband's title: his lordship observing that tenancy by the curtesy existed before the statute *De Donis;* that estates at that time were of two sorts, conditional or absolute, and that curtesy applied to *both;* that at common law, the only modification of estates was by *condition;* that all the cases which had been cited went upon the distinction of their being conditions, and not limitations, and that in the present case the wife, during her life, continued seised of a fee-simple, to which her issue might by possibility inherit (*a*).

Curtesy defeated by the wife's endowment of her mother.

An instance of the defeazance of the wife's seisin by a prior title, and consequently of the husband's right to curtesy, occurs in her endowment of her mother; because by such endowment, in affirmance of the mother's title to dower commencing before the wife's marriage, the wife's seisin became in fact that of a reversion upon an estate for life, which we have seen is not such a seisin as will intitle the husband to curtesy. But if the mother die *before* her daughter, (the estate for life determining by that event), then if the husband re-enter

Contra if the wife survive the mother, &c.

(*a*) Buckworth v. Thirkell, K. B. Trin. Term, 25 Geo. 3. 3 Bos. and Pull. 652, n. 1 Coll. Jurd. 332.

during the life of his wife, his title to curtesy will revive and be established (*a*).

A further instance of the title to curtesy determining with the seisin of the wife, may happen when such seisin is defeated by a stranger recovering the property in a court of justice against her and her husband. But if such recovery be afterwards reversed, the husband will be intitled to curtesy. In illustration of this, *Perkins* puts the following case :—

Or if a judgment against husband and wife for her estate be reversed.

If the husband and wife be seised of lands in fee as in the right of his wife, which are recovered from them upon false testimony, and after the issuing of execution they have issue, and the wife dies, the husband shall have attaint; and when he has recovered the estate, and avoided the recovery by attaint, he shall hold the land as tenant by the curtesy; and that the law was the same of a recovery against them by erroneous process (*b*).

The reason is obvious—for the only obstacles to the husband's title by curtesy were the judgments; and when they were reversed, his wife's seisin, which had been suspended, and out of which had arisen the right to curtesy, was revived.

Curtesy defeated by the fine or recovery of husband and wife.

2. Since, as it has been observed, the recovery in an action against husband and wife, of her estate will deprive the husband of curtesy, in consequence of the eviction of her seisin and possession; so it will be, if he and his wife join in a fine or a common recovery; for the natural effects of such acts are to pass or extinguish all rights and titles whatsoever. But if they concur in a fine of her estate, she being then under the age of twenty-one, and it is afterwards reversed on that account, her husband will be intitled to curtesy, and upon the same principle, as we have seen, that he is so

Contra if the fine or recovery be reversed;

(*a*) Co. Litt. 31, *a.*; and see for more particulars on this subject "Dower," chap. 9, sect. 2. (*b*) Perk. sect. 475. See 3 Black. Com. 403, for the proceedings in *attaint*.

intitled upon the reversal of a judgment against him and his wife.

It seems to have been once a question, whether such a fine should be reversed *quoad* the wife only, and not against her husband, who was of full age when it was levied. But since by the fine the husband parts with nothing *separately* from his wife, and were it to be reversed only against her, it would remain as the husband's sole fine, and operate as a discontinuance of her estate, contrary to the intention of the parties, it was adjudged in the case of *Charnock* v. *Worsley* (*a*), that the fine should be reversed *in toto*.

which, if at all, must be reversed in toto.

3. It has been observed that the husband may, during the marriage, by his own feoffment, extinguish his title to curtesy (*b*), and he may consequently do so by his fine.

But if after his wife's death he aliene the estate in fee or in tail, or for the life of the lessee, any of those acts will be a forfeiture of his tenancy by the curtesy, and the person intitled in reversion may have a writ of entry *in casu consimili* by the statute of Westminster the second (*c*). The alienations, however, that create such forfeitures, must be understood of those conveyances at common law, which, from their nature, displace and divest the estates in remainder or reversion as feoffments, &c.; for if the conveyance of a tenant by the curtesy were by lease and release, then, since nothing could pass by those deeds but what the tenant had to convey, no forfeiture would be incurred (*d*). The husband's living in adultery will not be a forfeiture of his curtesy; tenants by the curtesy and dower differing in this respect, as it will appear in a subsequent chapter (*e*). The reason is, that by the statute of Westminster the second (*f*), the wife is deprived of

Forfeiture of curtesy by the husband's conveyances at common law.

Contra if by lease and release, &c.

His adultery no bar.

(*a*) Cro. Eliz. 129. See F. N. B. 21. D. (*b*) *Supra*, p. 34. (*c*) Chap. 24. 2 Inst. 309. (*d*) 7 Term Rep. 277; and see chap. 2, sect. 1. (*e*) Chap. 11, sect. 3. (*f*) 13 Edw. 1, cap. 34.

dower, whereas there is no law by which the husband incurs a forfeiture of his title to curtesy from such misconduct on his part (*a*).

Contra if he commit treason, &c.

But the husband's attainder of treason, or other capital felony, will disable him from claiming curtesy (*b*).

There is little to be found in the books respecting the effects of a charter of pardon upon the title of the husband to curtesy; and the following observations upon the subject are founded on general principles:—

Effect of pardon in cases of treason, &c.

Suppose the offence, of which the husband is attainted, to be high treason; as the King alone is interested in the forfeiture, he may remit it (*c*), and restore the interest that the husband had in the estate; but the pardon of the King does not remove the corruption of blood that preceded such pardon. It seems, however, that the pardon's effect is different when the attainted person is seised of the estate, and when he is not the owner, but has or may acquire an interest in it in respect of the owner's seisin. In the first case, it would appear that the pardon not removing the preceding corruption of blood, that corruption estops the claim of any person to an interest to be derived from the attainted person in respect of his seisin prior to the pardon, a doctrine arising out of the feodal tenures, and founded upon the relation between lord and tenant (*d*). But there being no such tenure in the second case, it seems that the attainder is to be considered a personal disability only, a pardon for which, by removing such disability, places the party in the same situation in regard to his rights as if it had not occurred (*e*).

Thus, in the present case, the estate being the

(*a*) Sidney v. Sidney, 3 P. Will. 269—276. (*b*) Co. Litt. 391. (*c*) 2 Black. Com. 254. (*d*) 1 Leon. 3. Dyer, 140 *b*. (*e*) 15 East, 463. 13 Rep. 23. Co. Litt. 33; and see *infra*, chap. 11, sect. 3. pl. 2 and 3.

inheritance of the wife, it would seem that whether the husband had heritable issue before his attainder, or not till after his pardon, he would be equally intitled to curtesy in all estates of inheritance of which his wife was seised during the marriage.

Effect of pardon.

When the attainder is for a capital felony, in which the crown is not solely interested, but the Lord by *escheat* acquires a title, the pardon of the King can only waive the forfeiture of the estate for a year and a day, during which period he was intitled to hold it; after that, the right of the Lord commenced (*a*); but this life depends upon the period when heritable issue were born to the husband.

On the title of the Lord by escheat.

Accordingly, if the offence were murder, of which the husband was attainted, and he had *issue* heritable to his wife's estate at the period of his attaint, the Lord of whom the lands are holden has an interest by *escheat*, which, it is presumed, cannot be affected by the pardon; for after the birth of the issue the husband, as we have seen, became *sole* tenant to the Lord, and by the attainder he forfeited his tenancy, for which the Lord might enter and eject him; it is, therefore, conceived, that under those circumstances the royal pardon cannot, by the removal of the attainder by the grant of such pardon, place the husband in a condition to claim curtesy of the estate, to the prejudice of the Lord by escheat (*b*). If, however, there were *no* heritable issue at or prior to the attainder, the Lord's title to escheat would not arise; because until the husband have such issue, he is not sole tenant to the Lord; he cannot, therefore, escheat the tenancy *pro defectu tenentis*, for the wife is the tenant, and she with her husband must do homage until issue be born (*c*). It

---

(*a*) See 2 Black. Com. 251, for the distinction between Forfeiture and Escheat. (*b*) See Co. Litt. 351. (*c*) 2 Black. Com. 126.

appears, then, that the Lord, by escheat, has no immediate title to the estate, upon the husband's attainder for murder, &c. under the above circumstances. But the King, as we have seen, would, in such a case, be intitled to the profits of the land during the marriage (*a*), which he may remit by his pardon for that period.

The last subject for consideration is—

4. By what acts the wife alone may defeat her husband's title to curtesy.

Her power over that right, in exercising her privilege of election between her estate in tail and the benefits given to her by a will, disposing of that estate, has been noticed (*b*).

By her attainder of treason.

The wife's attainder of treason may or may not affect her husband's title to curtesy. Accordingly, if the attainder happen *before* the birth of issue, and the wife die, leaving issue, her husband will be barred of his curtesy. But if there had been heritable issue at the *time* of the attainder, it would seem, that such attainder would not devest the husband's estate of freehold, acquired by the birth of issue, expectant upon his wife's death (*c*).

Distinction to be made in regard to the time when the issue were born.

By attainder of other felonies.

With respect to other capital felonies committed by the wife, in which the Lord by escheat is interested, the effect of her attainder upon her husband's right to curtesy depends upon the like principles as those before mentioned. But it is proper to be here noticed, that by a recent Act of Parliament, it is declared, that no attainder for felony (except for the crimes of high treason, petit treason, or murder, or of abetting, procuring, or counselling the same) shall extend to the disinheriting of any heir, nor to the prejudice of the rights *of any person*, other than the offender, during his natural life only (*d*). Hence, it seems that the

---

(*a*) *Supra*, p. 3. (*b*) *Supra*, p. 26, 29. (*c*) 1 Hale's Pl. Cr. 359. "Curtesy," fo. 249 *b*. pl. 3. (*d*) 54 Geo. 3, cap. 145.

wife's attainder of any felony, except those mentioned in the statute, will not prejudice her husband's title to curtesy; and it is to be remarked upon the act, as to its effects on the title by *escheat*, that by saving the land to the heir it prevents a corruption of blood, and consequently an *escheat* to the lord, whose right is only *pro defectu tenentis* occasioned by that corruption (*a*).

Effect of Stat. 54 Geo. 3, c. 145. upon the title of the Lord by escheat.

After these remarks, we shall consider the attainder of the wife for a felony exeepted out of the statute, with regard to its effects upon her husband's title to curtesy.

Suppose, then, the wife to be attainted of murder *after* the birth of heritable issue; her husband's estate by the curtesy after her death will not be defeated; for the tenancy continues notwithstanding his wife's attainder, he being sole tenant, and competent alone to perform all the services incident to the tenure. But if there were no heritable issue previous to the attainder, the husband, although issue be *subsequently* born, will not be intitled to curtesy, because that issue cannot by possibility inherit the estate, on account of the attainder, so that the husband's title never arose (*b*).

Case of wife's attainder of murder since the statute, considered.

The only point remaining to be considered is the effect upon the title to curtesy of a charter of pardon obtained by the wife; and it seems a consequence from what has been said, that a question upon this subject can only arise where the husband had no heritable issue at the time of his wife's attainder.

Effect of her pardon upon her husband's title to curtesy of estates which she had at the time of the attainder and those she acquired afterwards.

If, then, whilst the husband has no such issue, his wife be attainted of any of the offences which would estop his title to curtesy, as of a crime excepted by the statute passed in the reign of the late King, and before referred to, and she obtains a charter of pardon, it is presumed that such pardon would not place the hus-

(*a*) 4 Hawk. Pl. Cr. 486. (*b*) Co. Litt. 40.

band in a condition to claim curtesy, at her death, in the estate of which she was seised at the time of the attainder; because the pardon did not remove the corruption of blood that such attainder occasioned previously to the grant of the pardon, which could only be done by act of parliament, so that the attainder remaining in force as to the lands of which the wife was seised before the pardon, interrupts her husband's title to curtesy, which is to be derived from her (*a*).

But of lands of inheritance acquired by the wife *after* the pardon, the husband will be intitled to curtesy upon the birth of heritable issue and the death of his wife (*b*).

So also will he be intitled if her attainder be reversed, or she die before judgment (*c*).

These subjects being more fully detailed under title "Dower" (*d*), the reader is desired to refer to it.

(*a*) See 1 Leon. 3, pl. 7; and Gate v. Wiseman, Dyer 140 *b*. (*b*) Co. Litt. 392. Perk. sect. 387. (*c*) 4 Black. Com. 392. Co. Litt. 390 *b*. (*d*) Chap. 11, sect 3, pl. 2 and 3.

CHAPTER II.

THE HUSBAND'S POWER OVER HIS WIFE'S REAL ESTATES.

In this chapter I propose to consider—

I. *The interests of the husband and wife in real estates given or devised to them during the marriage; and the effect of gifts or grants from the one to the other.*

II. *Discontinuances of the wife's estate by her husband, and the remedies which the common and statute laws have supplied to her, and the persons claiming her estate, against such acts.*

III. *The doctrine of remitter; and*

IV. *The husband's power to forfeit his wife's copyholds; and in what instances a Court of Equity will give relief.*

I. Of gifts or devises to husband and wife.

Husband and wife do not take in moieties.

It has been long since settled, that by gifts or devises of freehold or copyhold lands to the husband and wife, they do not take interests in joint-tenancy, as other persons, but that they take such benefits by entireties.

So that he alone cannot lawfully convey his wife's interest,

Thus, a devise to *A* and *B*, who are strangers to, and have no connexion with each other, creates a joint tenancy; and a conveyance by one of them will sever the joint interest, and pass a moiety to the alienee: but when a devise is made to the husband and wife, since they take by entireties, and not in moieties, the husband *alone* cannot, by his own conveyance, devest the wife's

estate or interest, so that if she survive him she will be intitled to the whole(*a*).

The principle of these and the like decisions is founded upon that unity of persons in man and wife, which the common law created upon the due solemnization of the marriage. By that law, all gifts, grants, and devises to husband and wife, and their heirs, operate in such a manner as to give to each the whole, and not in moieties; and the husband *alone* cannot dispose of any part of the estate so given. The law is the same whether the property be in possession, remainder, or reversion(*b*): and such an interest will not be forfeited by the treason of the husband, but the wife will take the whole(*c*). The same rule, as to husband and wife taking in entirety, prevails when a feoffment with warranty is made to a man and woman, who afterwards marry, and happen to be impleaded and vouch and recover in value; because at the time of recovery they were husband and wife, and unable to take in moieties. So also if livery of seisin was not made *secundum formam chartæ* until *after* the marriage; or in the case of a grant to them of a reversion, if attornment was not made before the solemnization of the marriage(*d*). But they may take in severalty by express limitation, as in the instance of limitation to *A.* for life, then to the husband for life or in tail, with the remainder to his wife for life or for years(*e*).

nor forfeit it.

Instances where they take in entirety under instruments made to them jointly before the marriage.

Instance of their taking in severalty in succession.

(*a*) Co. Litt. 187. Doe. dem. Freestone v. Parratt, 5 Term Rep. 652. Back v. Andrews, 2 Vern. 120. Prec. in Chan. 1. Green v. King, 2 Bl. Rep. 1211. See Doe v. Wilson, 4 Barn. v. Ald. 303, and Preston on Abstracts, vol. ii. p. 39.

(*b*) 2 Lev. 39. Co. Litt. 187, *b*. (*c*) Ibid. 187, *a*.

(*d*) Co. Litt. 187, *b*. (*e*) Where a legacy was given to husband and wife jointly, the wife being the daughter of the testator, and the husband a stranger in blood, it was held that the same duty was payable, as if one moiety had been given to the husband and one moiety to the wife. Attorney General v. Bacchus, 9 Price 30.

At common law husband could not grant, &c. to his wife.

2. Upon the same principle of union of husband and wife so as to be but one person, the husband could not by any common law conveyance give or grant any estate to the wife, either in possession, reversion, or remainder; and the same disability prevailed in regard to the wife(*a*): but an exception to this rule was introduced by the statute of uses(*b*). It was accordingly holden that if the husband made a feoffment or conveyance by lease and release to *A*, to the *use* of his wife in fee, such a conveyance would be good, and the wife seised of the inheritance; and upon this reasoning, that the legal estate passed from the husband to the feoffee or releasee; out of whose seisin the statute operating upon the use limited to the wife, transferred to it the legal estate, which for a moment was in the feoffee or releasee; and thus, by a subtlety evading the rule of the common law, that the wife cannot take by conveyance from her husband. That, since the statute, the legal estate must pass from the husband to another person in order to serve the limitation of the use to the wife, appears from this, that the husband cannot covenant *with* her to stand seised to her use. At present the wife may take an estate from her husband by limitation of an use as above; or by devise, because that does not take effect until after the marriage is determined(*c*). For the same reason, a donation *mortis causâ* by the husband to her will be good(*d*). And it seems that by the custom of particular places, as of *York*, the wife may take by *immediate* conveyance from her husband(*e*); or they may surrender copyholds to the *use* of each other(*f*), except the husband be lord of the manor, for

Alteration made by the construction put upon the statute of uses, and the reason.

That reason does not authorise her husband to covenant with her to stand seised to her use.

Instances where the wife may take an estate or interest from her husband.

(*a*) Litt. sect. 168. Co. Litt. 187, *b*. (*b*) 27 Hen. 8. c. 10.
(*c*) Co. Litt. 112, *a* and *b*. (*d*) Lawson v. Lawson, 1 P. Will. 441. Miller v. Miller, 3 P. Will. 356. See Walter v. Hodge, 2 Swan, 92. (*e*) Fitz. Prescription, 61. 1 Bro. Abr. Custom, fo. 201, *b*. pl. 56. (*f*) Bunting v. Lepingwell, 4 Rep. p. 29.

in that case the grant would be *immediate* to the wife, which, as before is mentioned, is not admissible(*a*).

Purchase in name of wife presumed to be a gift.

[The wife may also take from the husband by a purchase made by him in her name, or in their joint names, which will be presumed to have been intended as a gift and advancement to her, unless evidence of a different intention be adduced(*b*). And the wife, on surviving the husband, will be entitled, unless the property being personal, he in his lifetime alienes it(*c*). So where money was lent by the husband, and the securities taken in the joint names of himself and wife, she was held intitled by survivorship(*d*). And in a late case, where the husband purchased stock in the name of himself and his wife, the Lord Chancellor said that it was *primâ facie* a gift to her in the event of her surviving, unless evidence of cotemporaneous acts, showing a contrary intention, were produced(*e*). A transfer by the husband of stock already purchased into his wife's name, or into their joint names, would *a fortiori* be presumed to be a gift to her; a transfer being stronger evidence of an intention to give than a purchase in the name of another(*f*). In the same way, an expenditure voluntarily incurred by the husband in building upon or improving his wife's estate, redeeming the land-tax, or enfranchising copyholds(*g*), is presumed to be intended as a benefit to her(*h*). But where the husband paid off part of a debt due upon a mortgage of his wife's leasehold estate, under the idea that he was absolutely

---

(*a*) Firebrass dem. Symes v. Pennant, 2 Wils. 255.

(*b*) Kingdon v. Bridges, 2 Vern. 67. Glaister v. Hewer, 8 Ves. 199. (*c*) Christ's Hospital v. Budgin, 2 Vern. 683. (*d*) Watts v. Thomas, 2 P. Will. 364. (*e*) Wilde v. Wilde, 31 July, 1823. (*f*) George v. Bank of England, 7 Price, 646. Rider v. Kidder, 10 Ves. 360. See Lucas v. Lucas, 1 Atk. 270. (*g*) See *post*, sect. 4. (*h*) Campion Cotton, 17 Ves. 263.

intitled to the estate, his executor was allowed to stand in the place of the mortgagee (*a*).]

Discontinuance of wife's estate.

II. The common law imparted to the husband, as a necessary incident to the seisin he acquired of the wife's freehold estate by the marriage, a power by alienation of converting her interest in it to a mere right; for the property of the wife during the coverture being vested in her and her husband indivisibly, he acquired the right of *possession*, which being conveyed away by him, the wife was not allowed, from the unity of their estate and interest before described, to consider the act of her husband a disseisin of herself, which might be defeated by mere entry; but she was permitted to contest the *right* only: hence we have the import of the word "Discontinuance," viz. the alienation of the *possession* to the prejudice of the person having the *right of property*, defeasible by *action* only.

Remedy for issue, &c.

Discontinuance was always the consequence when a tenant in tail, or a husband seised in the right of his wife of her estate of inheritance aliened by fine or feoffment; the law presuming, that the alienors had sufficient interests to give full effect to those conveyances until the contrary was shown in a court of justice; for that reason it did not allow the estates of the conusee or feoffee to be defeated by entry. But the effects of the fine or feoffment being to give a larger interest than the conusor or feoffor had, viz. an estate in fee simple, the consequence necessarily was that of the estate tail being devested, which caused the remainders or reversion depending upon it to be displaced or discontinued, and with the estate tail to be converted into mere rights; to remedy which, the law provided the issue and the persons in remainder or reversion with

The tortious acts pass the rights of feoffor and conusor.

(*a*) Pitt v. Pitt, 1 Turn. Ch. Rep. 180. With respect to gifts by the husband to the separate use of the wife, see *post*, vol. 2, chap. 17, 18.

writs of *formedon*, as their rights to the possession accrued; but these conveyances were not void, they passed all the right and interest which the conusor or feoffor had at the times when the fine or feoffment was levied or made.

In *Berrington* v. *Parkhurst*, as reported in 13 *East*, 493, *Lord Hardwicke* expressed his idea of a discontinuance thus: "the *particular* estate and all the remainders over constitute only one estate; if, therefore, the particular estate be hurt, the residue of the fee, as subsisting upon that, must likewise suffer, and thence, it is said, that all the remainders are discontinued, because the *chain* of interests, which are carved out of the fee and which depend upon one another, is broken."

In instances where the husband aliened, as above, the inheritance of his wife, the law provided for her after his death, and for her heirs or issue after her decease, the writs of *cui in vita* and *sur cui in vita*, but which are now obsolete; for by a statute made in the reign of King Henry the eighth (*a*), *entry* is given to the widow, and the persons after her death beneficially interested. The act declares, "That no fine, feoffment, or other act thereafter to be made, suffered, or done *by the husband only*, of any manors, &c. being the *inheritance* or *freehold* of his *wife* during the coverture, shall in any wise be or make a *discontinuance* thereof, or be prejudicial to the wife or her heirs, or to *such* as shall have *right*, *title*, or *interest* to the same by the death of such wife; but that the wife, or her heirs, and such other to whom such right shall appertain after her death, may *enter* into such manors, &c. according to their rights and titles therein, any such fine, feoffment, or other act of the husband to the con-

Entry given by stat. 32, Hen. 8.

(*a*) 32 Hen. 8. chap. 28, sect. 6, explained by the 34 and 35 Hen. 8, chap. 22.

trary notwithstanding; (fines levied by the husband and wife whereunto the wife is party and privy only excepted)."

This being a *remedial* statute, courts of law have construed it according to its spirit and intention, and not according to its letter.

Extends to joint inheritance of husband and wife.

If, therefore, husband and wife be seised of a *joint* estate in fee simple or in tail during the marriage, and he aliene it by feoffment, the wife or her issue may enter upon the lands after her death, (*a*); but if the conveyance be by *fine* with *proclamations*, then the wife must enter within five years next after her husband's death, and commence and prosecute with effect such proceedings as after mentioned, or she will be barred by the statute of non-claim.

Entry to defeat husband's fine with proclamations.

Wife bound by laches of a second husband.

Accordingly,—Tenant for life, with remainder in fee to a married woman: the tenant for life levies a fine with proclamations, and dies, then the husband dies, upon which his wife marries again, and the tenant for life dies. Five years expire, and the second husband dies before his wife. The wife cannot enter under the authority of this statute, she being barred by the fine and non-claim, and bound by the neglect of her second husband (*b*). The fines of the husband relieved against by this statute are those *without* proclamations, so that fines *with* proclamations not being within the act, the statute of Henry the seventh (*c*), which relates to fines *with* proclamations, and limits the right of action or entry to five years, being unrepealed, bars the widow not entering as above; and the issue in tail are barred from the completion of the fine, the statute estopping every person claiming in *privity* to the conusor (*d*). Thus,

Issue bound by husband's fine, with proclamations.

(*a*) Greneley's case, 8 Rep. 142. (*b*) Whetstone v. Wentworth, Dyer 72 *b*. (*c*) Chap. 24. (*d*) Co. Litt. 326. 9 Rep. 140 *b*. Cro. Car. 477.

Husband and wife being seised in tail, remainder to the right heirs of the husband, have issue, and the husband alone levies a fine with *proclamations* to his own use; he then devises the land to his wife for *life*, remainder over, with a condition to pay a yearly rent out of it, and a clause of distress, &c. was added. The husband dies, and his wife enters *claiming* for life only, pays the rent, and then dies. Question, whether the issue in tail or the devisee in remainder should have the land?—and it was determined against the issue, because since he must claim as heir of the body of his father and mother, he is *estopped* by the fine with proclamations (*a*).

Effect of entry as to wife, issue, &c.

But suppose there had been remainders over upon failure of issue by the husband and wife, and that the wife had entered claiming her estate-tail, in which case she, as also the persons in remainder, would have been remitted to their ancient estates; still such remitter could not aid her issue, who would continue to be estopped by the fine (*b*); and whilst heritable issue existed, the persons claiming under the fine would be intitled to the estate, but which title would cease upon failure of the issue, and then the persons in remainder might enter under the above statute of Henry the eighth (*c*).

Reversions and remainders of wife within the statute.

Not only estates of the wife in possession, but reversions or remainders limited to her, are within the provisions of the statute.

If therefore the wife be intitled to a reversion or remainder in tail or for life expectant upon an estate-tail in the husband, she may enter upon his death without issue notwithstanding his discontinuance by feoffment; and if she neglect to do so, her issue, if the estate be in tail, and each person in remainder, when

---

(*a*) Dyer, 351 *b*. (*b*) Beaumont's Case, 9. Co. 138. Cro. Car. 476, and sec. 8 Co. 144. (*c*) Hob. 257, 259, 260, 261 And. 39.

there are any such, may successively enter so soon as their rights to possession commence (*a*). And if the discontinuance had been by a fine with proclamations, the wife and other persons in remainder would have had five years to make their entries from the periods when their respective titles to the possession began. In addition to which entries it is required by the statute of the 4th of Queen Anne, chap. 16, that for the purpose of avoiding a fine with proclamations an action shall be commenced within *one year* after the entry was made and be prosecuted with effect; but in the above case, if the husband tenant in tail had suffered a recovery, the remainder to the wife and all other remainders would have been defeated; for the statute of Henry the eighth provides only for the entry of persons having *lawful* rights and titles in the property aliened or discontinued; but the recovery duly and legally destroyed the wife's right and title, and all others in remainder; and such a bar incident to the husband's estate in tail was not intended to be prevented by the statute. Nevertheless if the husband procure himself to be impleaded upon a feigned title, and suffer a recovery without voucher, and permit execution to be taken against himself and his wife, that will be no bar to the wife, but she may enter (*b*).

Time when entry to be made, and when to avoid a fine, action to be brought, &c.

Recoveries not prevented by the statute. If not covinous or fraudulent.

If after the discontinuance of the husband he and his wife be divorced *a vinculo matrimonii*, she may enter *immediately*; for the coverture is determined, the marriage contract dissolved, and the wife's right to the possession commenced from the completion of the divorce (*c*).

Immediate entry upon divorce.

Although the statute mentions feoffments made by the husband *only*, from which it might be inferred that a *joint* feoffment by him and his wife was not within its

Statute extends to joint feoffments, &c. by husband and wife of her estate.

(*a*) Co. Litt. 326. 8 Rep. 144. (*b*) Co. Litt. 326, 8 Rep. 144. Touchst. 46. (*c*) 8 Rep. 145.

provisions, yet the contrary construction has prevailed, and for this reason, because the wife's joining in the feoffment being a void act so far as concerned her rights, and not equivalent to a fine in which she is separately examined, the feoffment is in truth the sole act of the husband (*a*). And upon the same principle, if they had joined in a *deed* of *bargain* and *sale*, which was afterwards inrolled, the wife might enter after her husband's death, although she was a party to the deed; against which she might plead *non est factum* (*b*).

But such a feoffment accompanied by *fine* bars the wife and her issue, and puts those in remainder to an action.

Yet if the wife were seised in tail with remainders over, and joined with her husband in a feoffment, and afterwards in a fine to the feoffee, the feoffment and fine would be considered as one assurance; and by the fine the entry of the wife and of the issue would be barred. The wife, therefore, being barred of entry at her husband's death by the *joint* fine excepted out of the statute, it would seem, that although a discontinuance of the remainders was effected, still that the persons claiming in remainder could *not enter* under that act upon the wife's death, or upon a failure of issue; for to bring the case within the statute, the wife must have a right of entry at her husband's death, or the persons in remainder will be left to their remedies at common law in cases of discontinuance, viz. to actions of *formedon* in *remainder*.

Thus *A* and *B* his wife were seised of land to them, and the heirs of the body of *A*, with remainders successively in tail to *C*, *D*, and *E*, with remainder to the right heirs of *A*. *A* and *B* made a feoffment with warranty to *F*; and *A* and *B* afterwards joined in a fine to *F*. *A* died without issue; *C* and *D* in remainder also died without issue (*D* being one of the parties to the feoffment); then *F* the feoffee died, the lands descending to his son and heir. Lastly *B* the wife died.

(*a*) Co. Litt. 326. (*b*) 10 Rep. 43.

Question, whether the entry of *E* (the last remainder-man in tail) upon the feoffee's heir was lawful? And it was decided in the negative; the court agreeing that the feoffment was a discontinuance, and that it and the fine made but one assurance; that the persons in remainder could not enter, but were in the same situation as discontinuees at common law (*a*).

Agreeably with the remarks preceding the last case, the Court observed "that when the wife was barred, and the estate destroyed by the fine, that she could not enter, neither could the persons in remainder." That observation obviously applied to the *joint* act of husband and wife, by which she parted with her interest *before* her right of entry accrued, and to do which she was permitted by the statute. The act, therefore, did not apply to such a case, so that the persons in remainder were left to their remedies at common law.

Instance where the wife's fine after her husband's discontinuance after death, and before her own entry, would not probably prevent the entries of the persons in remainder under the statute.

But suppose the wife to be seised in tail, with remainders over, and the husband to discontinue these estates, and then to die; and the wife, *before* entry, to levy a fine with proclamations and to die without issue. Would the persons in remainder be allowed to enter upon the discontinuee? It is presumed that they would be so intitled, for notwithstanding by the fine the wife so far confirmed her husband's discontinuance as to bar her own entry under the statute; yet as the right of those in remainder to enter upon the wife's death without issue was vested and complete at the husband's death, the act, by which she defeated her own entry and estate in tail, could not, it is conceived, injure those in remainder by depriving them of the privileges imparted for their benefit by the statute.

Entry to Lord by escheat not given by the statute.

The act of Henry the eighth does not extend to *irregular* entries, as *Hobart* terms them, which are

(*a*) King v. Edwards, Cro. Car. 320.

given by special statutes differing from the reasons of the common law.

If, therefore, the wife die without heirs after her husband's alienation of her estate, the lord by *escheat* cannot enter under the authority of the statute. He was not within its contemplation; such persons only being so who had rights or interests at the time of alienation, and whose entries were given in pursuance of them (*a*).

Copyholds; not within the statute.

Copyhold lands are not included within the letter or equity of the statute, and, as it seems, without prejudice to the wife, except in the special cases after mentioned, since the husband cannot by the general law of copyholds *discontinue* his wife's estate by *surrender;* for nothing passes to the surrenderee but what the surrenderor may lawfully part with; so that if a husband, being seised of copyhold lands in right of his wife, surrender them to the use of a person and his heirs, that will create no discontinuance, but the wife may enter after her husband's death (*b*).

In general incapable of being discontinued.

Since, however, custom is the basis of the rights of copyholders, it seems (as it has been adjudged) that if such custom authorised a tenant in tail of copyholds to make a discontinuance by surrender, a surrender would have that effect (*c*); the custom in this instance giving an effect to the surrender in passing a larger estate than the surrenderor had, which from the nature of such instrument it would not otherwise have possessed. Copyholds, then, not being within the statute, the wife in instances of special customs enabling her husband to discontinue her estate by surrender if left to her remedy at common law; and, according to *Erish* and

---

(*a*) Hob. 243—261. (*b*) 4 Co. 23. Gilb. Ten. 178—189. Bullock v. Dibley. Moor's Rep. 596. Poph. 38. Knight v. Footman. Leon. 95. Roll. Abr. 632. (*c*) Bullen v. Grant. Cro. Eliz. 148, 717.

Rivers (*a*), she may have the writ of *cui in vita*, or a plaint in the nature of that writ (*b*). But *Chief Baron Manwood*, according to *Saville* 67, said that copyhold interests were within general statutes where no prejudice was done to the custom, and that the statute of *Westminster* the second, chap. 4, which gave a *cui in vita*, extended to copyholds (*c*).

Entry is given by the statute where the writ *cui in vita* was given at common law.

At the common law if the husband aliened by feoffment or grant the freehold of his wife for the life of the feoffee or grantee, that was a discontinuance of her estate, and upon surviving her husband she was intitled to the writ of *cui in vita* (*d*); and since the statute of Henry the eighth she may enter upon the feoffee or

---

(*a*) Cro. Eliz. 717. (*b*) Dal. 116, pl. 8.

(*c*) S. P. Cro. Car. 43. 3 Co. 9. *a.* Dyer, 264. *a.* The action must be by plaint in the Lord's Court, the proper remedy for copyholders. Co. Litt. 60. *a.*

It was said in Collins v. Cancke, Cro. Jac. 105, and in Dal. 116, pl. 8, that the wife's estate was discontinued by the husband's surrender, but the contrary is settled. And it does not appear to have been decided that custom can give to his surrender the effect of a discontinuance. The husband may by custom have a larger interest in his wife's copyhold than that which he takes by the general law (see 1 H. Bl. 343. Watk. Cop. vol. ii. p. 88, *n.*), and in such case his surrender will operate to the extent of that interest; but in general a surrender, though followed by admittance, has no wrongful effect, but leaves the party entitled at liberty to enter. Cro. Eliz. 90. Watk. Cop. vol. i. p. 61. The case of Bullen v. Grant, cited in the text, related only to the effect of a surrender by tenant in tail of a copyhold, which was sometimes said to be by custom a discontinuance. The ancient authorities, which are much at variance on this subject, were considered in Carr v. Singer, 2 Ves. Sen. 603, and it may be inferred from that case that the surrender of tenant in tail is not a discontinuance, but that when it has any effect beyond his life, it is a bar of the estate tail.

If the husband's surrender could in any case operate as a discontinuance, there would be good ground for contending that the case would be within the statute 32 Hen. VIII. and that the wife might might therefore enter. See Cro. Car. 43. Gilb. Ten. 184. Bacon. Ab. copyhold, C. 2.

(*d*) Fitz. N. B. 193.

grantee at her husband's death; for in all cases where she was intitled to the above writ, a right of entry is given to her by that statute.

And such entry is regulated by the common law.

But although by that act the cases within it are no longer to be considered in strictness discontinuances, as a power of entry is given; it would seem that the right of entry must be subject to the law applicable to entries in general.

If, therefore, feoffee in fee of the wife's lands by the husband's discontinuance die, and the estate descend upon his heir, it seems that the wife after her husband's death, or her heirs, or the persons in remainder, could not enter under the statute, but must resort to their common law remedies by action; because such entries, by the general law regulating entries, are *tolled* by the descent *cast* upon the feoffee's heir; for, as the heir in such cases succeeds to the estate by the act of law, it protects his title, and will not suffer his possession under it to be devested by a mere entry, but upon proof of the claimant's title in an action (*a*).

It is to be remarked, that the above is a case in which the common law is not altered by the statute of 32 Henry VIII. c. 33, for that act continues a right of entry after a descent cast upon the heir of a *disseisor*, unless such disseisor had peaceable possession five years next after the disseisin (*b*).

In regard to the law concerning entries, distinctions prevail necessary to be known, especially in consequence of the statutes which have been made; and the results appear to be as follow:

Entry, &c. to avoid fine with proclamations.

Whenever a right of entry subsists after a fine has been levied *with proclamations*, an actual entry must be made within *five* years, and an action of ejectment

---

(*a*) Litt. sect. 385. Cro. Car. 320. But this is very questionable, as the entry of a feme covert is not taken away by a descent cast during the coverture, unless she was disseised before marriage. Co. Litt. 246, *a*. (*b*) Co. Litt. 256. 3 Black. Com. 177.

must be commenced within *one* year from the time of such entry, and prosecuted with effect (*a*).

A fine at common law, i. e. *without* proclamations, being neither within the statute of 4 Henry VII. c. 24, nor the statute of Anne, may be defeated by entry or action at any time within *twenty* years after the claimant's right accrued, such limitation being imposed by the 21 James I. c. 16 (*b*). And by the same act, all other entries are barred if not made within the same period.

And a fine at common law.

When the claimant's entry is taken away, and a right of *action* only remains, as in all cases of discontinuances not within the above statute of Henry the eighth, the party in reversion or remainder can only claim by bringing a real action *a formedon* (*c*), which by the above statute of James must be commenced within twenty years from the accruing of the right. And since the widow's right of action on account of the husband's discontinuance of her estate is, by the statute of Henry the eighth, displaced for a right of entry, such right will be barred (as before observed) as rights of entry in general.

Remedy when there is no right of entry.

The statutes contain saving and excepting clauses of the rights of infants, married women, &c. but when the disabilities terminate, the bars commence from those periods, and will proceed although a subsequent disability may occur; as for instance, if, when the time begins to run, a single woman marries, coverture will not prevent the completion of the bar, computing the termination from the period when such bar began (*d*).

As to the saving clauses in the statutes limiting the periods for entry.

In cases of fines with proclamations *six* years are allowed by the 4th of Anne, c. 16, from the disabilities

As to disabilities and their removal.

(*a*) 4 Anne, c. 16, sect. 16. Compere v. Hickes, 7 Term Rep. 732. Berrington v. Parkhurst, 13 East, 489. And Tanner v. Merlott, Willes Rep. 182. (*b*) 2 Wils. 45—47. (*c*) 4 Hen. 7, c. 24. 1 Vern. 213. Willes Rep. 342. (*d*) Duroure v. Jones, 4 Term Rep. B. R. 300.

ceasing to enter and bring an action; and in all *other* cases *ten* years are allowed by the statute 21 James I. from the terminations of such disabilities; and it seems that if the disability under the last statute continue during the life of the person *first* having right, then his heir will be intitled to the period of *ten* years, and no more, from the death of his ancestor to prosecute his title (*a*).

How entry to be made.

Entry upon the whole or on part of the premises in the name of the whole, when situate in one county, is the method of taking possession, when it can be done peaceably, and where actual entry is necessary. The same steps must be taken in each county when the lands lie in different counties. But when a peaceable entry cannot be made, the person intitled may make *claim* as near to the estate as he is able, observing the same forms and solemnities as in formal or actual entry. And since that amounts *in law* to an *actual* entry, it will have the same effect, as it is presumed, and in particular to authorise the proceedings required by the above statute of Anne. This claim being necessary to be repeated once in every year, was called "Continual Claim," which having been fully treated upon by *Littleton*, and by *Lord Coke* in his Commentary, the reader is referred to the chapter upon that subject (*b*).

Continual claim.

Actual entry is only necessary to avoid a fine with proclamations.

With respect to a fine with proclamations, it has been repeatedly decided that an entry to avoid it must be *formal* and *actual*, in the strictest sense of those terms,

---

(*a*) Doe v. Jesson, 6 East, 80. For the construction of the statutes of fines and limitations, see Plowd. 355. 1 and 2 Salk. 339—422. 4 Bro. Parl. Ca. *oct. ed.* 66. 1 Leon. 211—215. 3 Rep. 87. Sav. 128. Cro. Eliz. 890. 2 H. Black. 584. Cotterell v. Dutton, 4 Taunt. 826. Tolson v. Kaye, 3 Brod. and Bing. 217. Widdowson v. Harrington, 1 Jac. and Walk. 532. Cholmondeley v. Clinton, 2 Jac. and Walk. 1. 1 Turner, Ch. Rep. 107. (*b*) Co. Litt. 250, particularly sect. 417, 419, 420, 422, 423.

when it can be so made in peace (*a*). And the claimant should express that the entry is made to avoid all fines; but it has been established from the year 1703, and by practice since that time, that actual entry to support an ejectment is necessary only to avoid a fine with proclamations. Such entry may be made either by the claimant or any person by his authority, or by a person on his behalf without authority, if he assent to the entry within the five years (*b*); which assent may be signified by his bringing an action of ejectment.

III. After considering the remedy given to the wife by the statute of Henry the eighth against her husband's discontinuance of her estate, it is proper to notice the provision made by the common law to repair the injury whenever the opportunity offered. In order to understand this subject, it will be necessary—*first*, to consider the common law remedy—and *secondly*, the alteration made in it by the statute of uses (*c*), and the act of the 32 of Henry the eighth (*d*).

1. The common law remedy by remitter.

Remitter upon a right of *action*.

Remitters are twofold: the *first* is when a person, having a prior and perfect right to an estate recoverable by action only, has *cast* upon him and not gained by his own *act* a defeasible estate of *freehold* in the same premises. The *second* is where the party has the power of clothing his ancient right by *entry*. In the first case, since the party cannot bring an action against himself to establish his prior and better right, the law affords redress by remitting him to such right, *i. e.* in extending to him the same advantages as if there had been no obstacle to his recovery, and he had been in a situation to have commenced, and had prosecuted with

---

(*a*) Berrington v Parkhurst, 13 East, 495. 2 Stra. 1086. 4 Bro. Parl. Ca. 85, *oct. ed.* Dougl. 486. (*b*) Fitchet v. Adams, 2 Stra. 1128. Audley v. Pollard, Cro. Eliz. 561. (*c*) 27 Hen. 8. c. 10. (*d*) Chap. 28.

The second defeasible estate must be an *immediate* freehold *cast* upon the party, and *not* acquired by him or her.

effect, a real action to establish his prior right (*a*). In order to effect this species of remitter, the second defeasible estate must be an *immediate* freehold and *cast* upon the party having the prior right recoverable by action only, because the action could not be brought against a person having less than an estate of freehold; and until the party were intitled to the possession no right of action could accrue. But this second estate must not have been acquired by the *act* of the person to be remitted, for against his own deed and agreement he would not have been allowed to recover his prior right in an action if he had been under circumstances enabling him to have brought one (*b*). Hence, if the party could have no remedy by action for his first or old right, if the defeasible estate of freehold were in another person instead of being in himself, he cannot be remitted (*c*); as where he is barred of his first right by the fine or warranty of his ancestor (*d*).

Suppose, then, tenant in tail to discontinue by feoffment the estate tail, and then to disseise or to turn out of possession the alienee, or to take back to himself an estate in tail, or for life with remainder to his first and other son and sons successively in tail, and to die seised leaving a son: in either of these cases the common law remits the son upon his father's death, but not before, because the son's right to the possession did not commence sooner (*e*); yet the father is not remitted, because it was his own act and folly to take back the defeasible estate, which circumstance is a bar to his recovering his former right by action (*f*).

(*a*) But the party on whom a defeasible estate of freehold is thus cast, if sui juris, may it seems waive his former right of action, and elect to hold the new estate without being remitted. Bro. Remitter, pl. 39. 2 Roll. Rep. 34. 18 Vin. Ab. 454. pl. 2, 3. contra Keilw. 20. (*b*) Co. Litt. 363 *b*. (*c*) Co. Litt. 349 *b*. (*d*) Moor, 115. See also Co. Litt. 347, 348, 358. (*e*) Co. Litt. 358. (*f*) Litt. sect. 659.

But there was an exception to this latter doctrine arising from the nature of the estate which the discontinuor had at the time of the discontinuance.

Instance of remitter as an exception to the rule that the second estate must not be acquired by the act of the party.

Thus if husband and wife were tenants in special tail, with remainder to *B*, and the husband discontinued the estate, and afterwards took back to himself and wife an estate in special tail, the wife would by the common law, before the statute of uses and the act of 32 Hen. 8. c. 28, be remitted to her first estate tail, and immediately so, without regard to her husband's death; for she had a *present* right to the freehold, and not a future one, as in the instance of the issue before mentioned (*a*). The consequence of which remitter necessarily was the remitter also of the husband; for although the taking back of the second defeasible estate was *his*, not her act (*b*), yet since they, as has been before observed (*c*), took the new estate in *entirety* and not in severalty, the remitter of the one was necessarily also that of the other (*d*).

(*a*) Co. Litt. 351 *b*, 352 *a*. (*b*) It is stated by Littleton to be an exception to this doctrine, if the second estate be acquired by disseising the discontinuee, and the husband and wife are of covin and consent that the disseisin should be made: in this case he says there shall be no remitter, because the wife is a disseisoress. Sect. 678. But *Lord Coke* observes upon this, that a feme covert cannot be a disseisoress either by her commandment or procurement precedent, or by her assent or agreement subsequent. As to the acts by which a feme covert may be said to become a disseisoress, several conflicting cases are collected in Vin. Ab. Tit. Disseisin, D. E. F. which relate chiefly to the form in which the action was to be brought by the disseisee. It is laid down in one of these cases, (F. pl. 5.) and it seems to be consistent with principle, that if the husband and wife wrongfully enter, claiming in right of the latter, it shall be taken as the act of the husband only, and therefore that the wife is not a disseisoress. It is probable, therefore, that the exception alluded to above, could only exist in the case of a disseisin by the sole act of the wife; and even in that case, the wife having now a right of entry under the statute on her husband's death, would it seems then be remitted. (*c*) *Ante*, p. 51. (*d*) Litt. sect. 672. Hob. 255.

Remitters favoured, and why.

Since remitters tended to the advancement of ancient rights, they were favoured and promoted by the common law. When the ancient and new rights met together in the wife, the remitter was instantaneous, and the husband's disagreement to it was ineffectual to prevent it; for the remitter preceded such disagreement, so that the wife's prior right having been restored, could not afterwards be devested by her husband's dissent. Neither was the wife, after her husband's death, permitted to waive her remitter, and claim the estate limited to her during the marriage (*a*). But in regard to this privilege of election, it was only prevented when the first estate could not be waived by the wife, as when taken by her *before* marriage, in which case she could not, upon surviving her husband, disannul, by her election to take the second estate, the remitter which the law had worked during such marriage. If, however, both rights or estates were voidable by her, as when both accrued *during* the marriage, in such case she might have elected upon her husband's death, either to be remitted to her first title, or to renounce it, and take as a purchaser under her second title; but this power of election was subject to this restriction, that it could not be exercised if it tended to the injury of another person. These propositions will more clearly appear from the two following cases.

Remitter of wife not prevented by her husband's disagreeing to it.

When she might waive her right of remitter, and when not, according to her election.

Lands were given to husband and wife, and their heirs, and the husband made a feoffment in fee, and then the feoffee regranted the estate to the husband and wife in tail, and the husband died; the wife might have *elected* between the two interests or estates given to her after the marriage. But if the lands had been given to the husband and wife in special tail, with remainder to *A*; and the husband made a feoffment in

---

(*a*) Co. Litt. 356 *b*, 357 *a*.

fee simple, and the feoffee granted the estate back again to them for life, with remainder to *B* in fee: although this would be a case of election in regard to the wife, as both estates or rights accrued during the marriage, yet as *A* would be prejudiced by her electing to take the second estate under the feoffment, the law as in general remits her to her former estate, without respect to her election (*a*).

Remitter upon a right of entry may be when the second estate is acquired by the act of the party.

The *second* species of remitter is where a person has the power of clothing his ancient right by *entry*. Two things must concur in this remitter; a right of entry in respect of the old title, and, as it is presumed, an entry under the new (*b*), except when the latter is acquired by descent, and then no entry is necessary.

Remitter upon a right of entry has an advantage which does not belong to remitter upon a right of action. Thus, if a disseissee retake by his *own act* an estate in the land, and enter, he will be remitted (*c*); because the law in favour of right and for the remedy of wrong operates upon the entry, a common law right, and effects a remitter; yet as the second estate was acquired by the *act* of the party, he may elect whether he will be remitted or take such second estate (*d*). But if the second or wrongful estate be cast upon such person *by* the law, he will be remitted *nolens volens*. Accordingly, if the father disseise his son, and dies

---

(*a*) Hob. 71, 255. (*b*) Co. Litt. 363 *b*. 364 *a*. Gilb. Ten. 129. 1 Lev. 49. 2 Bulstr. 29. Cro. Car. 145. But according to some authorities, the remitter takes place when the right of possession is acquired under the new estate (except when acquired by the act of the party, or by way of use). Hob. 256, see *post* and Preston on Abstracts, vol. ii. p. 330. (*c*) Co. Litt. 363 *b*. (*d*) This agrees with what is said in Keilw. 41. But in the subsequent case of Wood v. Shirley, it was laid down according to the report in 2 Roll. Rep. 34, 35, that a party having a right of entry, who acquires a new estate either by act of law or by his own act, and enters, is remitted without the power of election. See also Litt. 695, 696. Gilb. Ten. 129.

seised, upon which the fee acquired by the disseisin descends to the son as heir, he is instantly remitted (*a*).

[But if the party having a right of entry takes a new estate, by matter of record, he is estopped from claiming in his former right and is not remitted (*b*). If he takes a new estate by deed indented, he is not remitted on acquiring it (*c*), but it has been decided that on entering under the new title, he is remitted (*d*).]

What has been said upon the common law doctrine of remitter will be sufficient to give an idea of the principles upon which it is founded: the consideration of which was necessary to the understanding of what follows upon this subject. The doctrine is fully discussed by *Littleton*, in his chapter "Remitter (*e*)," and by *Lord Coke* in his commentary upon the text; which, for details, may be consulted by the reader.

I shall now proceed—

2dly—To the consideration of the alterations made in the common law of remitter by the statute of uses.

By this statute (*f*) it is enacted, that when any person shall be *seised* of lands, &c. to the use, confidence, or trust of any other person, &c. the *person*, &c. intitled to the *use* in fee simple, fee tail, for life or years, or otherwise, shall from thenceforth stand and be seised or possessed of the *land*, &c. of and in the like estates as they have in the use, trust, or confidence; and that the *estate* of the person so seised to uses shall be deemed to be *in* him or them that have the use, in such *quality*, *manner*, *form*, and *condition* as they had before in the use.

It appears that this statute expressly transfers the freehold and possession to the person to whom the use

---

(*a*) Keilw. 41, pl. 7. (*b*) Co. Litt. 363 *b*. Gilb. Ten. 129. (*c*) Ibid. (*d*) Beauchamp v. Dale, Cro. Eliz. 20. Hob. 256. This is analogous to the effect of an entry under a new estate acquired by way of use, *post*, p. 74. (*e*) Co. Litt. 347 *b*. (*f*) 27 Hen. 8, c. 10.

or trust of the lands is limited; but it qualifies the title, and the possession of the *cestuique use*, in declaring that the possession and interest so transferred shall be in, and taken by him in such quality, manner, and form as he had *before* in the *use*, which implies a negative, viz. that the possession and interest so taken shall operate to no other purpose, but must be founded entirely upon the *new* estate acquired under the conveyance (*a*). Hence the effect of this enactment has been to exclude the doctrine of remitter in cases where a person's right under a good prior title has been *discontinued*, and a new defeasible estate has been limited to him in *use* by a subsequent conveyance (*b*); for if remitter were allowed, it would be a repeal of the statute, which in effect declares that the *cestuique use* shall take no other estate or interest than what was given to him in the *use*; but by the remitter he would take a possession, interest, and title quite different from that limited to him *by* the *use*. *Hobart*, C. J. thus expresses himself upon this subject—"It is clear, that if an infant or woman covert, having right of land discontinue, wherein *entry* was not lawful, come to that land by way of a *use* raised out of that estate, the *first taker* of such estate shall not be remitted for the violence of the letter of the statute 27 Hen. 8 (*c*); and that the *first* taker in this case is to be understood of the *first* taker of *every several* estate, as well in *remainder* as in possession."

No remitter when the second estate is taken by the limitation of a use, and there is no right of entry.

In the discussion of this subject we shall consider the different parts of *Lord Hobart's* declaration, as the most convenient method for imparting the observations which occur upon these questions.

(*a*) See Gilb. Uses, by Sugden, 180 note. (*b*) See p. 79.
(*c*) Vavasor's case, 2 Leon. 222.

Distinction as to remitter when the party has a right of entry, and when a right of action only to restore the first estate.

His Lordship's observations do not apply to the case of a remitter upon a right of *entry*, but to a remitter upon a right of *action*, both of which have been before considered. But now, by the statute of 32 Henry the eighth, mentioned in the last section, the husband's alienation of his wife's estate, as against herself and the persons claiming it after her death, is provided against by giving them a right of *entry* where a right of action only was the remedy at the common law. In these cases, therefore, this statute is a virtual repeal of the statute of uses, for it seems that in all cases where the estate discontinued by the husband is of the inheritance or freehold of his wife, of which she was seised before the marriage, whether the second defeasible estate of freehold be or be not limited to her by way of *use*, she will be remitted to her prior estate, upon her entry after her husband's death, or on their joint entry (*a*), which will also remit all the remainders depending upon it; for the common law right of entry having been given in those instances by the act of the 32d of Henry the eighth, all the incidents and effects belonging to the exercise of such a right by that law immediately attach to it, one of which is that of remitter. Accordingly, if the subsequent defeasible estate be taken to the husband and wife, and they enter, she will be *instantly* remitted (*b*); or if she take it in *remainder*, expectant upon her husband's death, she will be remitted upon entering when her right to the possession of the freehold commences.

Common law not now altered where a right of entry remains. Therefore entry being given to the wife, &c. by the 32d of Hen. 8, the common law doctrine of remitter attaches to it, notwithstanding the statute of uses.

The remitter of the wife is also a remitter of the estates in remainder or reversion.

But although the effect of the wife's remitter necessarily extends to restore and remit all remainders dependent upon her estate; yet that effect and consequence may cease, and those remainders and estates

---

(*a*) 1 Lev. 49. 2 Bulstr. 29. Hob. 254. (*b*) Litt. sect. 673. Hob. 254.

may be again turned into rights, as they were before the wife's remitter by the discontinuance of her husband. As an instance of this—

An instance where the remitter of the persons in remainder may determine.

Suppose the husband and wife to be seised of an estate tail with remainders over, and the husband *alone* to levy a *fine* with proclamations to the use of himself and wife in tail, with remainders over, and that they are in possession under the fine, both she and her husband are remitted, as also are the old remainders; and *if* she survive him, there will be no cesser of this remitter; but *if* the husband survive her, then the remitter of the remainders ceases with her particular estate upon which they were dependent; because upon the death of the wife, the law adjudges the husband to be seised from that time of the estate taken to himself by the fine; and all the other new estates created by such fine are restored by the ceasing of the remitter; in which new course the land will continue to go so long as there are issue inheritable under the old intail, who, notwithstanding their estoppel, by the fine of their father, from claiming the estate contrary to its uses, are, during their existence, sufficient to exclude the taking of the old remainders; for although the fine could not bar such remainders, yet it was competent to pass the old estate tail, by barring the issue of their claim, since they must deduce their title as heirs of the body of the person who levied such fine. The second fee simple having been restored, as above, it is a necessary consequence that the old remainders should be turned into *rights* to remainders only, for there cannot be two co-existent fee simples of the same estate, so that by the event of the husband surviving his wife, the result is the same as to the old estates as if there never had been a remitter; yet they are under the protection of the statute of the 32d of Henry the eighth, and the persons intitled to them may enter after the death of the husband and the failure of his issue. It must, however, be noticed, that if in the case proposed the wife

But such remainders are protected by the 32 Hen. 8.

had survived her husband, her entry within five years from his death would have been necessary to have defeated the fine with proclamations, as appears from what has been stated in the last section. To the able judgment given by *Lord Hobart*, in the case of *Duncombe* v. *Wingfield* (*a*), in which many points of the doctrine of remitter are discussed and elucidated, the reader is referred.

As to the wife's liberty to elect to be remitted under stat. 32 Hen. 8, or to take the second estate under the statute of uses.

It has been supposed that in all cases the wife is at liberty to *elect* to waive her right to remitter under the act of the 32d of Henry the eighth, and to take under the statute of uses (*b*); but it is presumed that the following distinctions now prevail on the subject since the passing of those statutes: an entry by husband and wife, after his taking the defeasible estate to himself and wife, will remit her to her ancient right (*c*), and which remitter, it is conceived, she cannot afterwards waive (*d*); but if they do not enter, then that they are seised of the defeasible estate during the marriage under the statute of uses, such estate being liable to avoidance after the husband's death by his wife's entry under the statute of Henry the eighth; and that if she do not enter, there is no remitter (*e*); and it is presumed that if she enters, the law by immediate operation upon her entry (a common law right) instantly remits her to her ancient title without regard to her election (*f*). But as by that law the wife was at liberty to elect between her two rights, when both were voidable by her after her husband's death, and such liberty of election did not prejudice another person (*g*): so it seems, that since the passing of the two statutes, when she takes both rights subsequently to the marriage (to

---

(*a*) Hob. 254. (*b*) Co. Litt. 347 *b*. note 1. (*c*) 2 Bulstr. 29. Hob. 254. (*d*) Co. Litt. 357. (*e*) 1 Lev. 49. Co. Litt. 363 *b*. Cro. Car. 145. 2 Bulstr. 29. (*f*) See Hob. 71, 255. 2 Roll. Rep. 33. Cro. Jac. 489. (*g*) *Supra*, p. 70.

both of which she may dissent after the death of her husband, and therefore avoid) she may elect to take either of them; and according as she elects, she will either take under the statute of uses, which precludes remitter, or under the act of the 32d of Henry the eighth, which will cause her to be remitted.

As an instance of this the wife's election:—

Instances of her election.

Lands were given *to* husband and wife in tail, remainder to the right heirs of the husband. After having issue, the husband alone levied a fine with proclamations to his own use; which barred the issue in tail. He then devised the land to his wife for life, with remainder to a stranger in fee; and charged it with the payment of a rent. The husband died, and his wife entered, claiming only an estate for life, and paid the rent charge, and afterwards died; and it was adjudged that she had waived her prior estate tail (*a*).

The following is another instance of the wife's election:

In *Hawtrey's* case (*b*), King Henry the eighth, by letters patent, gave lands *to* husband and wife, and to the heirs of the husband, to hold *in capite*; the husband enfeoffed *A* and *B* to the *use* of himself and his wife for their lives, with remainder to the use of a younger son for life, with remainder to the husband in fee. The husband died, his heir being within age, and in ward to Queen Elizabeth for other lands *in capite*; but the wife held the possession, and claimed her *first* estate. Whether the Queen should have the third part of this land in ward or not depended upon the question, whether the wife was or was not remitted to her first estate? And the Court, after considering the statute of uses and the act of the 32d of Henry the eighth, held that the wife was remitted; for that she had *election* to be in according to the statute of uses,

---

(*a*) Dyer, 351 *b*. (*b*) Dyer, 191 *b*.

or by the latter statute, since her entry thereby was congeable.

In cases where the wife has the power of election, it is presumed that if she and her husband enter under the new defeasible estate, her remitter during the marriage will be *sub modo*, *i. e.* until she be at liberty to elect; which will happen if she survive her husband (*a*). And if she enter generally without expressing in respect of which of her two rights the entry is made, the law will remit her to her first title (*b*).

Benefits to wife from remitter.

The beneficial effects of the wife's title by remitter appear from the following observations:—It avoids all grants and incumbrances made between the discontinuance and the remitter.

The avoidance of intermediate incumbrances, and as remitter to the principal draws to it all appendants, such remitter to the first defeats severances from the latter during the discontinuance. But there can be no remitter to the accessary if there be none to the principal.

Accordingly, if the discontinuee of the husband grant a rent or make a charge upon the estate, the remitter will defeat them, because the wife by her remitter holds by her prior and paramount title (*c*). Again,

Remitter to the principal remits also to every thing appendant or accessary to it.

Thus if husband and wife be seised in tail of a manor to which an advowson is appendant, and it is severed from the manor by the discontinuee, or he reserve it to himself in a regrant of the manor to the husband and wife for their lives, in both cases the remitter of the wife to the manor the principal will be a remitter to the advowson the accessary. But if the advowson alone had been regranted, there would have been no remitter of it, because the grant reconveyed a mere *title*, the *right* being in the person seised of the manor, and upon a bare title there can be no remitter (*d*); for no person can have or claim a *right* in the accessary

---

(*a*) Co. Litt. 357. (*b*) Ibid. Gilb. Uses, 155. 18 Vin. Ab. 454. pl. 2. (*c*) Co. Litt. 349. (*d*) Ibid. 349 *b*.

who has no right in the principal. This doctrine, as to remitter, applies to all inheritances regardant, appendant, or appurtenant.

Disadvantages incurred by wife in claiming under the statute of uses as a purchaser.

The above are advantages, amongst others, which the wife derives from her remitter. If she were to take under the statute of uses she would then come to the estate by a *new* title as a purchaser, and must be liable to all the charges and incumbrances which may have been made upon it since the discontinuance, and she must lose the accessaries to her estate which had been severed from it or reserved by the deed of regrant.

How and to what extent the statute of uses operates in alteration of the common law rule of remitter is the last point to be considered.

When estates are discontinued no right of entry existing, and the defeasible estates taken back are by limitation of uses, the statute of uses prevents remitter in each instance of a several and separate estate, whether in possession or remainder.

According to the doctrine of *Lord Hobart*, before stated (*a*), the first taker of *every several* estate as well in *remainder* as in *possession*, will not be remitted when the second or new estate is limited by way of *use*, and the *cestuique uses* have rights of *action* only to recover their old or prior rights or estates. In order to illustrate this—

Suppose *B* to have been seised in tail with remainder to *C* in tail, and to have been disseised by *A*, who after being in peaceable possession of the estate for five years (*b*), died seised; and that the tortious fee acquired by the disseisin descended to *D* his heir, by which descent the *entry* of *B* was *tolled* or taken away, and then *D* the heir limited again the estate, by way of *use*, to *B* in tail, &c. It seems that the remitter would take place thus—*B* during his life will not be remitted, as he took the *first* several estate in possession; and if *B* die without issue, *C* will not be remitted, because he took the *second* several estate in *remainder*.

But it is adjudged that the words of the statute of

(*a*) *Ante*, p. 74. (*b*) See stat. 32 Hen. 8, c. 33; and *supra*, p. 64.

uses are satisfied by the application of them to the first takers of each several estate as above, and that the persons claiming under each of those persons as the stocks or purchasers, since they take or succeed by descent to their estates, such estates are subject to and regulated by all the rules and incidents of the common law, and consequently to remitter. In the above case then, although *B* cannot be remitted, yet if he leave issue they will be remitted, because their title is by descent; but if he leave none, as first supposed, then, although *C* cannot be remitted as the taker of the *first several* estate in remainder as a purchaser, yet if he leave issue they will be remitted, &c. &c.

Exception. A case, however, may occur when the taker of a remainder may be remitted contrary to the above doctrine. This will happen when a remitter takes place under a limitation prior to the remainder; and the reason is, that the remitter of a prior estate has the effect of remitting to all subsequent ones dependant upon it.

Thus, in the case above proposed, if *B* died leaving issue, who upon his death are remitted as we have seen, such remitter would be a remitter of *C* in remainder, and of all subsequent estates (*a*).

In the remainder before mentioned, *C* has been supposed to be an indifferent person, but the rule would be the same if *C* were a married woman, the statute of the 32d of Henry the eighth applying to discontinuances by the husband only, and giving the wife a right of entry in those cases: whereas in the case above supposed, the discontinuance by *B* turned the remainder in *C* to a mere right, recoverable by action only; which in regard to remitter, under the statute of uses, placed the wife in the same situation as any other person, and as *C* as above.

(*a*) Hob. 256.

IV. It was noticed in the second section that the husband cannot make a discontinuance of his wife's copyhold estates, except there be a special custom enabling him to do so; and that, when such a custom prevails, the discontinuance is not within the statute of Henry the eighth, considered in the same section; the lord of the manor, therefore, not being bound by it, it is necessary to consider what acts of the husband will be such forfeitures, as to bind the customary estate of his wife after his death. Forfeiture of Wife's Copyholds.

It is presumed that all such acts of the husband as are ruinous to the estate, destructive of the tenure, or tend to deprive the lord of any of his rights, will be a forfeiture of the wife's copyhold estate, and conclude her after her husband's decease. The duty of abstaining from all such acts may be considered as originating in conditions annexed to the estate at the time of its original grant, which are obligatory upon all persons who succeed to the property. From the observance of such conditions married women are not exempted (*a*), and for which there is no ground of complaint, since by marriage, which was their own voluntary act, they place their customary estates in the power of their husbands, whom they substitute tenants to the lord in their places, and they are, therefore, bound by all the consequences of their husbands' acts. At law.

The commission of waste is an act ruinous to the estate, and destructive of the interest of the lord; it is a breach of one of the conditions upon which the continuance of the tenure depends, viz. that the tenant shall do no injury to the inheritance, under the penalty of forfeiting his estate, so that it is to be expected, from what has been said, that authority is not wanting to show that waste committed by the husband is a forfeiture of his wife's copyhold estate. By waste.

(*a*) Co. Litt. 246 *b*.

Accordingly we find it resolved in the case of *Clifton* v. *Molineux* (*a*), that where a woman, tenant for life of a copyhold, takes a husband, who commits waste against the custom of the manor, and dies, the estate of the wife is *utterly* forfeited by the act of her husband.

By fine or feoffment.

So also if the husband levy a fine, (not afterwards continuing in possession (*b*), or make a feoffment with livery of seisin (*c*) of his wife's copyhold lands, that will be a forfeiture, for by those modes of conveyance the tenure is destroyed, they operate by a transmutation of the possession, and devest the lord of his right,

Not by lease and release, or bargain and sale.

passing a *fee-simple* to the conusee or feoffee (*d*). But if the conveyance were by lease and release, or bargain and sale, the effects of which are to pass the interests which the releasor or bargainor had a *right* to convey, and no more, such acts will not be a forfeiture; so that in this case the husband being merely tenant at will, according to the custom of the manor, he had a right to convey nothing (*e*); these conveyances, therefore, being inoperative, occasion no forfeiture (*f*).

Nor by a lease for years.

It has been decided (*g*) that if the husband grant a lease for years of his wife's copyhold estate not war-

---

(*a*) 4 Rep. 27. 1 Roll. Abr. 509, pl. 40. (*b*) This qualification to the general rule, that a fine by a copyholder is a forfeiture, was suggested by Mr. Justice Buller in Doe v. Hellier, 3 T. R. 173, on the ground that where the fine is levied without a change of possession it does not bar the lord. The point was not noticed by the other judges. (*c*) Without livery of seisin no estate is gained by the feoffment, and therefore no forfeiture is incurred. Co. Litt. 59 *a*. Ibid, *note* 3. Watk. Cop. vol. 1, p. 327. (*d*) Doe *d.* Tarrant v. Hellier, 3 T. R. 162. Litt. sect. 74. (*e*) As a bargain and sale operates only under the statute of uses, and as a copyholder being a tenant at will cannot be seised to an use, his bargain and sale passes no legal interest. The same reason applies to a conveyance by lease and release, where the lease is made in the usual way by a bargain and sale. (*f*) Gilb. Ten. 255. (*g*) Saverne v. Smith, Cro. Car. 7; and see *infra*, p. 92.

ranted by the custom, the forfeiture will cease with his life, and that his wife shall have the land afterwards.

This determination may probably appear to the reader as an *exception* to the general principle, since such a lease is a breach of the custom, and incompatible with the tenancy, as it passed a common law interest. If the copyhold had been the husband's estate it would have been absolutely forfeited (*a*); and it has been observed that the wife by her intermarriage gave her husband equal power over her copyhold property; then why the same acts should not produce the same effects in both cases does not appear (*b*).

Other conditions annexed to the copyholder's estate are, the performance of all the services precribed by the custom. These conditions are equally obligatory upon a *feme* copyholder, and it follows that if her husband wilfully break any of them, a forfeiture of her estate may be the consequence (*c*).

But non-performance of suit and services, &c. will have that effect.

Thus if the husband actually refuse to perform suit and service (*d*), or disclaim the tenure (*e*), or refuse to attend the lord's Court after a proper personal summons (*f*), or to pay the accustomed reserved rent (*g*), &c. such misconduct will be a forfeiture of the wife's estate, if the lord avail himself of it; because by those refusals the conditions by which the estate is holden

---

(*a*) What will be a lease working a forfeiture.—See Cro. Eliz. 351—498. Cro. Jac. 301. Cro. Car. 233. Bulstr. 215. 4 East, 221. 2 Taunt. 52, and Co. Litt. 59, in notis. (*b*) The reason given is because "this act is a tort to the feme as well as to the lord, and when there is a tort to the feme it is not reasonable that it should be a forfeiture of her estate." 6 Vin. Ab. 140, pl. 5. (*c*) See 1 Stra. Rep. 454. Hedd v. Chaloner. Cro. Eliz. 149. (*d*) Dyer, 211 *b*, and Belfield v. Adams, 3 Bulstr. 80. (*e*) 3 Leon. 180. (*f*) Sir Christopher Hatton's case, mentioned in Cro. Eliz. 505. See also 1 Roll. Abr. 506, pl. 50. (*g*) Style, 146. 1 Roll. Abr. 506, pl. 35, 40. Godb. 142.

are broken, the consideration fails, and the lord is intitled to resume his grant.

As to the lord's waiver or dispensation of forfeitures.

So long, however, as the copyhold tenure remains, the lord may waive any forfeiture committed by his tenant (*a*), in which event the wife's estate will be preserved.

Such forfeitures as do not destroy the tenure he may waive.

Accordingly, if after the tenant's refusal to pay the accustomed rent, the lord distrain for it (*b*); or if he amerce his tenant for a refusal to do suit and service (*c*); these and the like acts of the lord will be a waiver of the forfeitures; and it would seem that acceptance of rent by the lord would have the same effect, if the act of forfeiture was such as not to destroy the estate or tenure before the lord's entry or seisure; because the tenancy continued, and the rent must be considered as received in respect of it (*d*).

But not those which destroy the estate.

But if the forfeiture be of such a kind as to extinguish the tenure *ipso facto*, and by creating a fee-simple to disseise the lord of his estate, in such a case there can be no dispensation of the penalty by the lord, because the interest in respect of which he was enabled to waive the forfeiture no longer exists.

Thus it is laid down in the Supplement to *Lord Coke's* Copyholder (*e*), "That if a copyholder levy a fine, make a feoffment, or suffer a common recovery, which destroys the estate, no acceptance of rent or act done by the lord shall be available to make the estate good again." In conformity with this proposition *Treby*, Ch. J. in *Eastcourt* v. *Weekes* (*f*), distinguished between forfeitures (such as those incurred by levying a fine, &c.) which cannot, and those which can be waived; as by the grant of a lease for years, or committing waste; the latter, he observed, "are at the election of the lord, and may be waived by acceptance

---

(*a*) 3 Term Rep. 171. (*b*) Co. Copyh. sect. 61. (*c*) 1 Leon. 104. (*d*) 1 Salk. 187. and see 3 Term Rep. 171. (*e*) Sect. 11. (*f*) Freem. 516. Lutw. 803.

of rent, &c.; but in the other case no act of the lord can purge the forfeiture, because in the case of a fine, &c. the copyhold is *utterly* extinguished." In *Doe* d. *Tarrant* v. *Hellier* (*a*), *Buller*, J. considers those passages to be law, with this qualification, that the copyholder do not continue in possession of the estate after the fine; for to devest the lord of his right there must be a transmutation of the possession, the passing of a fee-simple to the disinherison of the lord; which connot be where the possession continues with the conusor; and he compared such a case to that of a mortgagor levying a fine and afterwards continuing in possession of the estate, which would be no bar to the mortgagee (*b*).

The jurisdiction of Courts of Equity to relieve tenants against legal forfeitures.

As to the cases in which Courts of Equity will relieve against the forfeitures of copyholds, and by that means preserve the wife's estate, when it has been legally forfeited by her husband, it has been considered that the many particulars of difference subsisting between this species of property and that of freehold tenure (*c*), rendered the application of the general doctrine of Courts of Equity, as to relieving against forfeitures, not always suitable to copyholds. According to this doctrine, if a copyhold tenant committed waste, or if he demised his lands without a licence, contrary to the custom of the manor, a Court of Equity would have no jurisdiction to relieve him against the forfeitures resulting from such acts, in analogy to its general rule, where satisfaction can be made to the party injured; because forfeitures for such acts as these were not made so from any notion of the tenant's intending to do injury to the inheritance, but upon the principle of his

---

(*a*) 3 Term Rep. 173. (*b*) The distinction between different acts creating a forfeiture with respect to the possibility of dispensation, is mentioned with doubt by Lord Coke. Compl. Cop. 66. And it is also questioned by Lord Kenyon in 3 T. R. 171. (*c*) See 2 Black. Com. 90, 284.

quitting or disclaiming by them his ancient right or estate, which was thereby determined. So it was stated by *Lord Macclesfield*, in *Peachy* v. *Somerset* (*a*), and he declined to relieve a copyholder against forfeitures which he had incurred at law, by granting leases and committing waste; and upon the peculiarity of the relation between the lord and his copyhold tenant, *Lord Rosslyn*, in the case of *Dench* v. *Bampton* (*b*), refused to injoin the tenant from committing waste, or to decree satisfaction for the waste which had been committed, his Lordship observing, that the law settled the matter between the lord and his tenant, that the right of the former was purely legal, and that his remedy was his entry or seisure for the forfeiture. But that decision has been over-ruled by *Lord Eldon*, who in a modern case (*c*) injoined a copyhold tenant, at the suit of the lord, from committing waste. The equitable jurisdiction may probably be thus considered, viz. that when complete satisfaction can be made, and the forfeiture is not wilful (*d*), relief will be given to the tenant. This has accordingly been done in instances where the waste was committed by the tenant under a misconception of his power or right, or by a stranger without his permission (*e*); so also where there was a reasonable excuse for the non-performance of an indifferent ceremony, as when the tenant, from religious scruples, declined to take the *oath* of fealty to his lord (*f*).

Where there are equitable circumstances,

such as mistake or misconception of tenant of his right;

Another equitable ground for relief in these cases is, where the condition annexed to the estate or tenure is such as to be considered merely a security for the per-

or where the condition broken is considered as a mere security for the performance of the tenant's act:

(*a*) 6 Vin. Abr. 113, pl. 9. Pre. Ch. 567, S.C. 1 Stra. 447, S.C. See also Skin. 142. (*b*) 4 Ves. 700. (*c*) Richards v. Noble, 3 Meriv. 673. In this case the bill did not waive the forfeiture; but it was held that the lord might sustain an injunction to prevent further waste without dispensing with the forfeiture already incurred. (*d*) 6 Vin. Abr. 114, 152. 1 Eq. Ca. Abr. 121. (*e*) Toth. 108—237; and Nash v. the Countess of Derby, 2 Vern. 537, explained Pre. Ch. 574. (*f*) Pre. Ch. 574. 2 Vern. 664.

formance of an act by the tenant; for there the Court can relieve in the instance of a non-performance, because it may be done *in substance*, although it has been neglected to be performed at the *time* and *place* appointed; and the lord will have no reason to complain, since he will receive all that he can conscientiously demand.

as for rents, or fines.

Accordingly, if a forfeiture had been incurred at law for non-payment of rent, or of a fine, a Court of Equity might relieve the tenant, as complete compensation might be made to the lord, and the forfeiture may be considered to be intended as a security merely for such payments (*a*).

In two instances married women are secured against forfeiture for non-admittance and non-payment of fines by 9th Geo. 1.

In conclusion must be noticed a cause of forfeiture, from which a married woman was not in any case exempted, previously to the statute after mentioned, viz. when she neglected to be admitted tenant, for which cause the lord might by *special* custom have entered for a forfeiture (*b*), or without such a custom he might have seised the lands *quousque* the wife came in to be admitted. But by a statute passed in the reign of George the first (*c*), it is declared that married women intitled by *descent* or surrender to the use of a *will*, who have not been admitted, may be admitted tenants of their copyhold estates, either personally or by their guardians or attorneys; and in case of neglect, that the lords of

---

(*a*) Prec. Ch. 572. 1 Strange, 453. The jurisdiction now exercised by Courts of Equity in relieving from forfeitures is less extensive than that which appears to have been assumed in some of the early cases. See Sparks v. Liverpool Waterworks Company, 13 Ves. 428. Reynolds v. Pitt, 19 Ves. 134. White v. Warner, 2 Mer. 459, and the authorities there cited. As between landlord and tenant the relief is confined to forfeitures arising from non-payment of money, where the amount of the compensation to be paid can be fixed by a certain rule, that of computing principal and interest, and it is no ground of relief that the act occasioning the forfeiture has done no injury to the landlord. See 2 Price, 206. 18 Ves. 63. 19 Ves. 141, 142. 2 Mer. 459. The principles on which these cases have been decided, seem to apply equally to forfeitures incurred by copyholders.
(*b*) Gilb. Ten. 231. (*c*) 9 Geo. 1. c. 29.

whom the lands are holden may appoint guardians or attorneys for the purpose, and impose and levy the *usual* fines, by receiving the rents, &c.; and that the neglect or refusal of the women to be admitted or to pay such fines, should not be any forfeiture.

Not when they claim by deed, &c.

It appears that the above act applies to two cases only, viz. where the wife is intitled by descent, or upon a surrender to the use of a will; and it has been determined, in a case where she claimed under a deed (*a*), that such was not a case protected by the statute; so that the lord may, in the instances not mentioned in the act, seize the wife's estate, until she claim admittance, or enter for a forfeiture, if the custom authorise it, and not otherwise (*b*).

Effect of enfranchisement of the wife's copyholds obtained by the husband.

[The effect of an enfranchisement of the wife's copyhold or customary estates obtained by the husband was discussed in a late case (*c*). The wife being the owner of a customary estate in fee, the lord enfeoffed the husband in fee, and afterwards gave livery of seisin. The husband and wife having died, their eldest son became intitled by descent, and entered; and upon his dying intestate as to part of the estate, the question was, whether it descended to his heir *ex parte materna* or to his heir *ex parte paterna*. It was argued that the feoffment took effect only as an enfranchisement by releasing the services, leaving the estate descendible as before; and the Court inclined to this opinion, intimating that the deed of feoffment operated as an enfranchisement before livery of seisin was given, and that the course of descent was not thereby altered. It appears to have been considered that the feoffment operated in the first instance as a release of the services only and not as a conveyance of the freehold to the

---

(*a*) Kensington v. Mansell, 13 Ves. 240. (*b*) The Earl of Salisbury's case, 1 Lev. 63. Doe d. Tarrant v. Hellier, 3 Term Rep. 170. (*c*) Doe dem. Newby v. Jackson. 1 Barn. and Cress. 448.

husband: and a release, though made to one having only a partial interest, may enure for the benefit of the other parties interested according to their respective estates (*a*). It seems therefore that where the enfranchisement is by a release of the services, it may take effect by extinguishing the tenure only, giving the wife the same interest in the freehold which she previously had in the copyhold (*b*).

If the lord grants to the husband of a feme copyholder by an instrument operating as a conveyance of the freehold to him and his heirs, it will be severed from the manor, and it seems that the freehold and copyhold estates will subsist as distinct interests (*c*), the tenure being only suspended during the coverture, as in the case of a marriage between the lord and tenant (*d*), and that the copyhold interest will descend to the heir of the wife, and the legal estate in the freehold to the heir of the husband. In *Wynne* v. *Cookes* (*e*), it was considered that a purchase of the freehold by a tenant for life of a copyhold estate, was to be treated as having been made for the benefit of all the parties interested in it, and upon that principle, the heir of the wife would be intitled to a conveyance of the freehold on repayment of the consideration given for the enfranchisement.

Where the husband and wife were intitled to a copyhold estate to them and their heirs, and the husband purchased from the lord a conveyance of the freehold to him and his wife, and the heirs of their two bodies, it was held that they took a new estate, and that the copyhold was extinguished (*f*).]

(*a*) Co. Litt. 279, b. Vin. Ab. Release, L. a. (*b*) See Rich v. Barker. Hardr. 131. Preston. Conv. vol. 3, p. 541—548. (*c*) Murrel v. Smith, 4 Co. 24, b. Cro. Eliz. 452. See Gilb. Ten. 208. Waldoe v. Bartlet, Cro. Jac. 573. (*d*) Anon. Cro. Eliz. 7. Co. Comp. Cop. 66. Watkins, Cop. vol. 1, p. 359. Co. Litt. 13, a. n. 4. (*e*) 1 Bro. C. C. 515. In Campion v. Cotton, 17 Ves. 263, it does not appear in what manner the enfranchisement of the wife's estate was taken. (*f*) Stockbridge's case, Cro. Eliz. 24. See Palm. 217. Croft v. Lyster, cited. 2 Vern. 164.

CHAPTER III.

THE subjects treated of in this chapter are—

I. *Leases at common law of the wife's estate granted by her husband and herself jointly, or by him singly.*

II. *Leases granted by them under Stat. 32 Hen. VIII. chap. 28; and*

III. *Leases granted by husband and wife under powers in private conveyances.*

I. Having considered the power of the husband over his wife's estates of inheritance by discontinuance, and the remedies which the common law and the statute of Henry the eighth gave to the wife, her issue, and the persons in remainder, as also the husband's power to forfeit her copyhold or customary estates, the next subject which presents itself, is the husband's authority to grant leases for years of his wife's estate. Upon reference to that act, it appears, that although it altered the common law in favour of married women, and the persons intitled to her real property, by facilitating their remedies against discontinuances made by husbands; yet that it provided for the encouragement of husbandry by insuring to the lessees of the husband and wife, the lands of the wife during the terms granted; and in doing so the statute rendered firm and obligatory the contracts jointly made by hushand and wife during the marriage, against them and their issue; for by the common law leases or demises made by husband and wife by *deed* of her estate, were determinable by her after

her husband's death. If such leases were granted for the lives of the lessees, they were voidable by action, since such grants were discontinuances, as before mentioned (*a*); and if such grants were for years, or for the wife's life, they were determinable by entry or by action; both kinds of leases being voidable at the *election* of the wife (*b*). It is necessary, therefore, to consider the common law upon this subject, since it is at present applicable to leases not within the above statute: but as the wife's remedy for her husband's discontinuance of her estate, by a grant for the life of the lessee, has been before considered, what further remains to be inquired into relates merely to leases granted for years or for her life of her estate.

Leases by husband and wife voidable by her at the common law.

Having just noticed the wife's right of election, it is to be observed, that the period for the exercise of that power is after her husband's death; and that acceptance of *rent* by her, or by a *second husband*, if the right of election be not before exercised, will be a confirmation of the leases (*c*).

Election.

Confirmation by acceptance of rent.

[It has been held (*d*) that the rule by which the lease of an husband and wife is confirmable by the election of the wife surviving, is an exception to the general disability of coverture, allowed only for the advancement of agriculture, not extending to a joint demise for a long term of years by way of mortgage, and therefore that a demise of this description could not be confirmed by the wife surviving, except by redelivering the deed, or by acts amounting to a redelivery.]

But this power of election in the wife is incapable of delegation or transfer, except by the operation of law, as in the instance of a second marriage, before men-

Wife's right of election not transferable.

(*a*) *Supra*, p. 63. (*b*) Bro. Accept. 6, 10. Resceit, 70. Keilw. 10. Bro. "Barre," 27. 1 Roll. Abr. 349. Cro. Jac. 563. (*c*) Doe v. Weller, 7 Term Rep. 478. (*d*) Goodright v. Straphan, Cowp. 201.

Joint leases by her and her husband confirmed by their fine.

tioned; so that a joint lease by husband and wife, by deed, will be confirmed by their joining in a *fine* to a stranger, because the wife cannot exercise her right of election after the fine, and it could not, as a *chose in action*, pass to the conusee; of necessity, therefore, the lease is valid during the wife's life. Such seems to have been the opinion of the Court, in *Cadee* v. *Oliver*, although the point was not finally decided (*a*).

Similiter by her fine after husband's death.

Upon the same principle, a fine by the wife, after her husband's death, would produce the like effect, if levied before her election had been exercised.

Election to avoid or confirm leases can only be by the persons who after her death claim the estate in privity to her.

It is to be observed, that persons only claiming the lands demised after the wife's death in *privity* to her, and not by a title paramount, have the like privilege with her of election. To illustrate this—

A, a single woman, and *B*, being joint tenants for their lives, *A* married *C*, and then *A* and *C*, by indenture, demised the moiety of *A* to *D* for twenty-one years; *A* died, and then *B*, the surviving joint tenant, entered. The question was, whether *B* could avoid the lease, as *A* might have done if she had survived her husband, *C*: and it was decided in the negative, because *B* did not claim under *A*, but by a title paramount; since, therefore, there was no person who had such privity to *A* as to avoid the lease, it was necessarily good during the life of *B*, if the term did not sooner expire (*b*).

Copyholds. Joint leases of them voidable by wife. Forfeiture to lord purged by wife's entry. Joint demises of copyholds holden of wife's manor will not destroy the custom.

In regard to copyhold estates, and to leases granted by husband and wife, it is decided, that a lease by both of them of the wife's copyhold for a term of years, not warranted by the custom, is voidable by her after her husband's death, and upon her entry the forfeiture to the lord is purged. So also, if the husband and wife demise lands holden of the wife's manor, and he dies, the custom of demising them by copy will not, as is usual, be

---

(*a*) 3 Leon. 153, 154. Cro. Eliz. 152. (*b*) Smallman v. Agborow, Cro. Jac. 417.

destroyed; because the wife may avoid the lease when her husband is dead, which will defeat the demise *ab initio* (*a*).

Parol leases for years by husband and wife void;

When the joint lease granted of the wife's estate was by *parol*, there was this distinction; if it were for her life it was good till the livery was defeated by her entry (*b*); if for years, it was void against her, and could not, therefore, be confirmed by her acceptance of rent after the decease of her husband, because her consent was necessary to the commencement of the lease, and it ought to have been manifested by deed or writing (*c*).

therefore incapable of confirmation.

Different effects of fines levied by husband and wife after a lease by parol and by deed have been granted by them.

Hence, if after such a *parol* lease for years, a fine had been levied by the husband and wife to a stranger, the lease would be equally void against the conusee as against the wife, so that he might enter. And note the diversity of effect in regard to the conusee and lessee, when the lease is void, as in this case, and when voidable, as in the instance before given (*d*). But now, by the act of the 29th of Charles the second, chap. 3, all leases of land must be in writing, and signed by the parties, or their agents duly authorised, except such leases as do not exceed the term of *three years*.

Stat. 29 Char. 2, chap. 3.

Leases by fine and recovery.

Leases by husband and wife of her lands, by fine, are binding upon them and their issue; and if by recovery, duly suffered, they are also good against the persons in remainder or reversion.

Whether leases for years by deed by husband alone are void or voidable after his death.

Since it was necessary, as we have seen, that the wife should consent to the commencement of the lease, and that nothing short of that consent appearing by deed or in writing, would be sufficient, so as that a parol lease for years by her husband would be void against her surviving him; it seems to follow, that if such lease

---

(*a*) 4 Rep. 27. 2 Roll. Rep. 361. Cro. Car. 7. Cro. Eliz. 149. 3 Rep. 27 *b*. 28. 1 Roll. Abr. 509, pl. 30. Cro. Eliz. 459; and see *supra*, page 83. (*b*) Bro. "Barre," 27. (*c*) Dyer, 91 *b*. 146 *b*. (*d*) Cro. Eliz. 216. Leon. 247.

were by *deed*, and granted by *him alone*, it was also void against his wife, and that it was, therefore, incapable of her confirmation after his death (*a*). I am aware that a different decision was made in the case of *Jordan* v. *Wilkes* (*b*); but which it is presumed, would not be allowed to overturn the authorities and principles before stated and referred to (*c*).

(*a*) Bro. Leases, 24. Barre, 27. 2 Rep. 77 *b*. Touchst. 230. Cro. Jac. 564. (*b*) Cro. Jac. 332. (*c*) It is also stated in Bacon's Abr. vol. 3, p. 13, to be clearly agreed, that a lease by the husband alone is good for the whole term, unless the wife or her heir dissents. This position is controverted by Mr. Serjeant Williams. See 2 Saund. 180, note 9, where the authorities are minutely examined, and a distinction suggested between leases for life and leases for years, that as the estate in the former case commences by livery, it can only be defeated by entry; but that in the latter it determines absolutely on the husband's death. And with respect to a lease for life, with livery made by the husband alone, it seems to be certain that it would continue after his death, till avoided by the wife or her heir by action before the statute, 32 Hen. 8. c. 28, or by entry since that statute. And according to Jordan v. Wilkes, *ub. sup.* and Dixon v. Harrison, Vaugh. 46, a lease for years by the husband alone is voidable only. And it seems to follow from the nature of the husband's seisin (supra, p. 3,) that the estate conveyed by him must continue till defeated by action or entry. See 3 Bulstr. 272. Preston on Abstracts, vol. 1, p. 335. Co. Litt. 325, b. n. 2.

It is also laid down in Bacon. Ab. *ub. sup.* that acceptance of rent after the husband's death will confirm the lease; but this does not appear to have been decided, and although the estate conveyed by the husband may continue till avoided by the wife or her heir, it is not a necessary consequence that acceptance of rent will render it unimpeachable. Where the lease was for life, and therefore good till defeated by a *cui in vita*, it was held that acceptance of rent by the wife after the husband's death did not bar her from bringing that action. See 4 Vin. Ab. 101, pl. 9, 102, pl. 11, cites Bro. Barre, 27. Bro. Acceptance, 1. And in 4 Vin. Ab. 102, pl 10, it is said generally, that acceptance of rent by the wife on a lease by the husband alone will not bind her. The case of a lease by husband and wife jointly is different, both because she stands in a different situation with respect to the covenants and the reservation of the rent, and because the contract being in her name she may elect to adopt it. In Jordan v. Wilkes, and Dixon v. Harrison, the question

II. Having in the former pages shortly traced the effect of the husband's leases of his wife's estate at common law, the next consideration will be such leases as the husband and wife are empowered to grant of her estates by virtue of the statute 32 Hen. VIII, chap. 28; for if the leases are not authorised by that statute, legal questions, in regard to their validity and otherwise, must be decided by the rules of the common law, as explained or altered by statutes. The act declares—

Stat. 32 Hen. 8, chap. 28.

"That all leases to be made of any lands, tenements, or other hereditaments, by writing indented, under seal, for term of years, or for term of life, by any person or persons, being of full age of twenty-one years, having an estate of inheritance, either in fee simple or in fee tail, in their own right, or *in right of their wives*, or *jointly* with their wives, of an estate of inheritance, made before the coverture or after, shall be good and effectual in the law against the *lessors* (being husband and wife) and their *heirs*; PROVIDED that the act shall not extend to any lease to be made of any manors, lands, tenements, or hereditaments, being in the hands of any farmer or farmers by virtue of an old lease, except such lease be expired, surrendered, or ended within one year next after the making of the said new lease, nor shall extend to any grant to be made of any *reversion* of any manors, lands, tenements, or hereditaments, nor to any lease of any manors, lands, tenements, or hereditaments, which have not most commonly been letten to farm, or occupied by the farmers thereof, by the space of twenty years next before such lease thereof, made; nor to any lease thereof made without impeachment of waste; nor to any lease to be made above the number of twenty-one years, or three lives at the most, from the day of the making thereof; and that upon

---

of the effect of acceptance of rent did not arise. On this subject see also Goodright v. Straphan, Cowp. 201. Perry v. Hindle, 2 Taunt. 180. Hill v. Saunders, 2 Bing. 112, post. sect. 2, pl. 10, and chap. 4, sect. 1.

every such lease there be reserved yearly, during the same lease, due and payable to the lessors and their heirs (to whom the same lands should have come after the deaths of the lessors, if no lease thereof had been made, and to whom the reversion thereof shall appertain according to their estates and interests), so much yearly farm or rent, or more, as hath been most accustomably yielded or paid for the manors, &c. so to be letten within twenty years next before such lease thereof made; and that every such person or persons, to whom the reversion of such manors, &c. so to be letten, shall appertain, as is aforesaid, after the deaths of such lessors or their heirs, shall and may have such like remedy and advantage to all intents and purposes against the lessees thereof, their executors and assigns, as the same lessors should or might have had against the same lessees. Provided also that the wife be made *party* to every such lease which shall hereafter be made by her husband of any manors, &c. being the inheritance of the wife; and that every such lease be made by *indenture* in the *names* of the husband and wife, and she to *seal* the same; and that the farm and *rent* be reserved to the husband and to the wife, and to the heirs of the wife according to her estate of inheritance in the same; and that the husband shall not in any wise alien, discharge, grant, or give away the same rent reserved, nor any part thereof, longer than during the coverture, without it be by fine levied by the said husband and wife; but that the same rent shall remain, descend, revert, or come, after the death of such husband, unto such person or persons and their heirs, in such manner and sort as the lands so leased should have done, if no such lease had been thereof made."

In the granting of leases under the above statute the following particulars are requisite to be complied with, and which, if not in fact complied with, will vitiate the leases by virtue of the statute; and since those leases are innovations upon the common law, and

are sanctioned only by a particular act of parliament under certain terms and conditions, if those terms and conditions be not strictly pursued, so as that the leases are void at law, a Court of Equity has no jurisdiction to supply the omission (*a*).

No jurisdiction in a Court of Equity to supply defects in these cases.

1st. The subject demised must be manors, lands, tenements, or hereditaments. The reason is, that it is out of such subjects only that a rent can be reserved by law, with proper remedies to enforce the payment of it. Of things, therefore, which lie in grant only, as fairs, markets, franchises, commons, advowsons, piscaries, hundreds, and the like, a lease under the authority of this statute cannot be made, although they may have been customarily let (*b*).

Subjects demised must be corporeal hereditaments.

What not demisable under the act.

But it seems that such a lease for twenty-one years may be made of tithes, although they lie in grant only, because they are a tenth part of the profits of land, and the profits are the land itself, and an action of debt at the common law might have been brought for the recovery of rent reserved on a demise of them for *years*, and such rent will pass with the reversion (*c*), and bind an assignee of the lessee, against whom the like action will lie. But as no such remedy is given in the case under consideration upon a lease for *life* of tithes, it would seem that such a lease would not be authorised under this statute (*d*).

Tithes may be so demised for 21 years, but as it seems not for lives.

2d. The subject demised must have been most commonly let to farm, or occupied by tenants by the space of twenty years next before the lease made.

If, therefore, the lands have been let for *eleven* years at one time, or at different times within that period, it

Lands let during 11 within the last 20 years may be demised.

(*a*) Cowp. 267, and Anonymous, 2 Freem. 224. 1 Scho. and Lef. 71. (*b*) Co. Litt. 44 *b*. Touchst. 278. Co. Litt. 47. (*c*) Bailey v. Wells, 3 Wils. 25. Tipping v. Grover, Raym. 18. (*d*) Co. Litt. 44, *b*. note 3. And the law on this subject is not altered by the statute 5 Geo. 3, c. 17, which authorises leases for lives of tithes by ecclesiastical persons.

will be sufficient (*a*); but such lettings must have been made by persons seised of an estate of inheritance (*b*).

Lands usually demised by copy within the statute.

The statute does not require that the property should have been let upon lease, so that tenancies at will are sufficient; and it has been determined that demises by copy of court roll for lives or for years are sufficient lettings to farm within the statute (*c*). But the demise under the authority of that act must be made by deed indented (*d*), as in general cases after mentioned.

But the lease must be by indenture.

[Hence if the husband and wife be seised of a manor in right of the wife, and make a lease by indenture of lands previously demised by copy, it will be within the statute (*e*).

Copyholds not being in general demiseable, are said not to be within this statute (*f*); but if the husband and wife be seised in right of the wife of a copyhold estate, which has been usually demised by custom or by license, it seems that a lease of them might be supported under the statute (*g*).]

3d. The property demised must be of an estate of inheritance in the wife, or in her and her husband jointly.

If the wife be seised for life only, such estate is not within the act.

If, therefore, the inheritance be in the husband, the wife having an estate for life only, a lease under the statute will not bind her (*h*).

And the act does not bind persons in reversion or remainder.

And it must be observed that the statute renders valid the leases granted under its authority, against the husband and wife and their heirs only, so that when the inheritance determines, as in the instance of an intail, by a failure of issue, such leases also determine,

---

(*a*) See *infra*, under title "Leasing powers in deeds, &c." as to lands once let under a long term expiring within the twenty years, and the lands not let again. (*b*) Touchst. 278. Co. Litt. 44 *b*. Dyer, 271 *b*. (*c*) Tustian v. Roper. Jones, 29. Co. Litt. 44 *b*. The Dean and Chapter of Worcester's case, 6 Rep. 37. Moor. 759. Cro. Jac. 76. (*d*) Gilb. Ten. 180. (*e*) Gilb. Ten. 179. (*f*) Gilb. Ten. 179, 185. Cro. Car. 44. (*g*) See Watkins's Cop. vol. ii. p. 194, *n*. (*h*) Co. Litt. 44, note 2.

and are void against the persons in remainder or reversion, except such remainder or reversion be limited to or be in the lessors, or one of them, in either of which cases the leases will be valid during the term (*a*).

4th. The lease must be made by deed *indented;*— The statute requires the lease to be by indenture.

A deed *poll*, therefore, is insufficient; but if the deed be actually indented, which supposes a counterpart, it is immaterial whether the deed begins or not, as is usual, with the words, "this indenture" (*b*).

5th. The lease must be sealed by the wife, and she and her husband must be named parties to it. And to be sealed by the wife.

[The proviso which requires the wife to join in the lease speaks of estates being the inheritance of the wife, while the first section authorises leases of estates of which the husband is seised in right of the wife or jointly with the wife. In *Smith* v. *Trinder* (*c*), the husband and wife being jointly seised, the former alone made a lease. Three Judges held that the case was not within the proviso, and that the lease was therefore good under the first section: but *Hobart*, C. J. doubted this, and the point was not decided.]

6th. The lease must be a lease in possession and not in reversion, or according to the statute, to commence from the making, or the day of the making of it. Also to be a lease in possession.

[A lease in reversion cannot be granted, though it be made to determine within the period of twenty-one years, or three lives. Though an interest for either of these periods may be granted, it cannot be done by means of two leases, one taking effect on the determination of the former (*d*)].

As leases in possession and in reversion under the statute, and under private powers, are in relation to this

---

(*a*) Touchst. 280. Godb. 9. (*b*) Co. Litt. 143 *b*. 229. (*c*) Cro. Car. 22. (*d*) Doe dem. Sutton v. Harvey. 1 Barn. and Cress. 426. As to the question whether concurrent leases may be made, see *post*. sect. 3, and Sugden on Powers, 595.

requisite subject to the same rules, the consideration of both must be here blended.

When leases commence that have dates, or impossible dates, or no dates, or are antedated.

If, then, the lease have no date or an impossible one, it commences from the delivery.

If the lease have a proper date and be delivered upon the same day, without mentioning when it shall begin, it commences from the delivery (*a*), which will be presumed to have been made on the day of the date, until the contrary be proved (*b*).

If the lease be made for twenty-one years, or for three lives, from the making, or from its sealing and delivery, or from henceforth, it will commence from the delivery, whether it be with or without date (*c*).

And if a lease be *ante* dated, and the contents import that it was to begin from a day subsequent to its date, still if the deed were not executed until *after* that day, it would be good as a lease in possession, since its legal effect and operation commenced from, and not before its execution (*d*).

And of leases in possession and in reversion.

But in all cases where a power authorises leases to be granted *in possession*, if the lease granted in pursuance of it happen to be made to commence and actually commences upon a day subsequent to its date, or after the determination of a prior unexpired lease, such new lease will be void; because it is a lease in reversion (*e*).

The strictness which prevails upon this subject will appear from the following case:—

A, tenant for life, had a power of leasing for twelve years *in possession* and *not* in remainder, reversion, or expectancy. *A*, by indenture dated and executed upon the 29th day of *March*, 1798, demised the lands in

---

(*a*) Co. Litt. 46 *b*. (*b*) Cro. Jac. 264. (*c*) Norris v. the Hundred of Gawtry. Hob. 140. Co. Litt. 46 *b*. (*d*) Ambl. 740. 4 East, 477. 10 East, 427. 15 East, 32. (*e*) 5 Term Rep. 567.

tillage from the 13th of *February* preceding, the pasture grounds from the 5th of *April* next following, and the residue of the premises from the 12th of *May* then next, for twelve years from those several periods. Although the lease was authorised by the custom of the country, yet the Court decided that the lease was void *in toto*, it being a lease in reversion, since it was made to commence as to two third parts of the premises from periods subsequent to the date and execution of the lease, which was contrary to the express words of the power (*a*).

In relation to which subject leases made to commence from the dates, and from the days of the dates, are considered.

In the ancient cases much nicety and subtlety prevailed in instances when the leases were made to begin *from the dates*, and when from the *days* of the *dates*, and it was understood from those cases that the words from the date *included* that day, so that a lease containing these expressions by beginning upon that day, would not be a lease in reversion; hence a lease so made under the authority of the statute would be good and binding. It was also understood from those cases that the words "from the day of the date" *excluded* that day, so that such a lease would not be authorised by the statute, as being a lease in reversion, and it would not, therefore, bind the wife or the persons claiming under her.

The cases above referred to cannot be reconciled, but they were considered by *Lord Mansfield* and the other Judges of the Court of King's Bench, in the case of *Pugh* v. *Duke of Leeds*, below stated, in which case those subtleties and distinctions were duly considered, and after mature deliberation upon the old decisions, the Court determined that the words "from the date," and "from the day of the date," were of the same import, and that they included the day of the date, and might or might not do so in other cases, according to the subject matter; the Court justly observing, that

---

(*a*) Doe d. Allen v. Calvert. 2 East, 376.

the construction so given was in support of the deeds of parties, and to give effect to their intention; but that the other construction was a subtlety to overturn property, and to defeat that intention, without answering any good end or purpose. The case of *Pugh* v. *The Duke of Leeds* (*a*) was to the following effect:—

A lease for twenty-one years, under a power to make leases *in possession* for that term, was made to commence "from the day of the date." Upon a case stated for the opinion of the Court of King's Bench on the validity of the lease, as one in possession, it was decided that the lease was good:—1st, upon the intention of the parties;—2dly, upon the generally received sense and acceptation of the words themselves;—and 3dly, because the word "from" might in the common use, and even in the strict propriety of language, mean either *inclusive* or *exclusive*.

Hence it is to be inferred, that whether a lease for years, under the statute of Henry the eighth, be made to commence from the making, or the date, or the day of the date, it will be good as a lease *in possession*.

And with respect to leases for three lives, made under the authority of that act, and expressed to commence from the days of the dates, it is presumed that they would be good although possession were delivered on the same days (as they would be valid if possession were deferred till a subsequent period (*b*);) but which could not be so if the "days of the dates" were to be considered exclusive of the days upon which the leases appear to be dated; for if such were to be the construction, then as the leases were not to begin until the days next following, the operation of the livery would be suspended during the days of their dates, and the leases must, therefore, commence *in futuro*, viz. the next subsequent days, which the law

---

(*a*) Cowp. 714; see also 5 Term Rep. 567. 10 East, 431.
(*b*) Freeman v. West, 2 Wils. 165.

does not allow in cases of freehold interest. In that event, therefore, a lease so made and intended to be protected by the statute, would be defeated.

7th. The leases must not be made without impeachment of waste.

The leases must not be without impeachment of waste either by express provision or by operation of law.

If a lease be made without impeachment of waste in express terms, there can be no doubt as to its invalidity against the wife and her issue.

The consequence will be the same if it be so framed as to prevent the lessee from being made liable to waste; so that if the lease were made for life, with *remainder* to *B* for life, it would not be authorised by the statute; because during the continuance of the remainder to *B*, the first tenant for life would not be liable to an action of waste, which is prevented by the interposition of *B*'s remainder for life; and although it has been alleged, that a lease to a man for the lives of three other persons is in the same predicament, since if he die during the continuance of any of the lives, the person succeeding to the possession, called an *occupant*, would not at the common law be punishable for waste; yet such objection is without foundation, for an action of waste may be sustained against the occupant upon the statute of *Gloucester*, chapter the fifth, which gives that action against any person holding in any manner for life or years, and the occupant holds for term of life (*a*).

8th. The leases must not exceed twenty-one years, or three lives.

They must be either for years or for lives.

Hence it appears that there cannot be two leases granted of the same property, the one for years and the other for lives, but one lease only; and if that be for lives, it may be made either to one person during the lives of three other persons *in esse*, or to three persons for their own lives (*b*); so also leases made for less

(*a*) 6 Rep. 37. (*b*) Baugh v. Haines, Cro. Jac. 76. Wyndham v. Halcombe, 7 Term Rep. 713.

periods than twenty-one years, or three lives, are good under the statute (*a*). And it is to be noticed, that if in the demise there be an excess of duration not warranted by the act, as for *four* lives, or for *fifty* years, the lease will not at law be valid under the statute during three of the lives, or for twenty-one years, but would be void in *toto* (*b*).

Any excess in the term makes leases void *in toto* at law, as leases under the act.

A lease for years determinable on lives not within the act.

Suppose, then, a lease by husband and wife to be granted for ninety-nine or for sixty *years*, if they should so long *live*, or determinable upon *three lives*; would this be a lease within the statute? It is presumed that it would not;—1st, because the act distinguishes between terms for years and terms for lives, and intended that those different interests should not be blended in one lease, although the duration of the lessee's interest could not exceed one of the periods prescribed by the statute;—2dly, because the act intended that if the lease granted was for *years*, it should not by possibility exceed twenty-one years; but in the case supposed it might endure for ninety-nine or for sixty years;—3dly, because such a lease is neither for twenty-one years, nor for three lives;—and, lastly, because under an ordinary power to lease for three lives or twenty-one years, a lease for ninety-nine years, determinable upon three lives, would not, as it has been adjudged, be a due execution of the power (*c*).

I am aware that in *Bacon*'s Abridgment, under the title "Leases" (*d*), it is considered that such a lease would be good under the statute, but the authorities there referred to do not appear to warrant the conclusion. In *Smith* v. *Trinder* (*e*) the point was not made or discussed; and in *Whitlock*'s case (*f*) no particular kind of lease is mentioned, the power there

---

(*a*) Isherwood v. Oldknow, 3 Maule and Sel. 382. 5 Rep. 6 *b*. 8 Rep. 70 *b*. (*b*) Touchst. 277. (*c*) Roe *d*. Brune v. Prideaux, 10 East, 158. Touchst. 277. Ambl. 340. (*d*) Page 69. (*e*) Cro. Car. 22. (*f*) 8 Rep. 69 *b*.

being to grant leases *generally* in possession or reversion, so as they did not exceed three lives or twenty-one years; any lease therefore not exceeding those limits, whether for terms for years only, or for terms determinable upon lives, were within such power. But the power by the statute is more restricted: it empowers leases only for a limited term of years, *or* for a term of three lives, and then withdraws its protection from leases granted for *either* of these terms; *i. e.* from the former if it exceed twenty-one years, and from the latter if not made according to its directions. The author of the *Touchstone* asserts it to have been resolved, that if tenant in tail make a lease for ninety years, determinable upon three lives, such lease was not warranted by the statute (*a*); and in *Roe d. Brune* v. *Prideaux*, before referred to (*b*), it appears that successive tenants for life, when in possession, were authorised to lease for any term or number of years not exceeding twenty-one, or for the life or lives of any one, two, or three persons, *so as* no greater estate than for three lives should be at any one time in being in any part of the premises; and the Court determined that the power merely authorised a lease for twenty-one years, *or* a lease for three lives, and that leases granted under the power for ninety-nine years, determinable upon lives, were void in *toto*, and not even good *at law* for twenty-one years.

9th. Old leases are required either to have expired when the new ones are granted, or to be surrendered within one year afterwards.

Old leases must have expired, or be surrendered within a year after the new ones are granted. This surrender may be conditional.

If the old leases be not expired they may be surrendered absolutely, or upon a condition or engagement that the new grants be made within a limited time, as within a month or a week, and if the condition be complied with, *i. e.* the new leases made

(*a*) Touchst. 277. (*b*) 10 East, 158, 187.

Surrender in law.

within the time, they will be binding under the authority of the statute (*a*); for a surrender in *law* is sufficient, and by the acceptance of the new the old leases are surrendered and *ended*, the word used in the statute (*b*). It will make no difference if the new leases be made to commence at a future time, since if they be accepted at the period when it arrives, the old leases will then determine and the new commence (*c*). But the new leases must be competent under the statute to pass the interest intended; for if not, then the acceptance of them cannot be a surrender of the old leases (*d*); neither will *cancellation* be a surrender of them, for the statute of the 29th of Charles the second, chapter 3, expressly declares that no lease of any lands or houses shall be *surrendered*, unless by *deed* or *note in writing*, signed by the party or his legally authorised agent. And if a lease be cancelled with a view to its surrender, upon the faith and validity of a new lease granted under the statute or other power, in that case, if the second lease be defective and void, then the first will be considered as never having been surrendered,—first, because the cancellation had not that effect, and secondly, because the new lease should not so operate contrary to the intent of the parties, who merely agreed upon the surrender of the old, in contemplation of the validity of the new lease; and although the new and void instrument should recite that it was granted in part consideration of the surrender of the old lease, still such recital will not have the effect of a surrender

Cancellation of the old leases no surrender.

Recital in the new leases that the old ones were surrendered will not amount to a surrender.

(*a*) Wilson v. Carter, 2 Stran. 1201. (*b*) And it has lately been held, that the substitution of one tenant in the place of another with the consent of the landlord, is a surrender in law of the lease of the first tenant. Thomas v. Cook, 2 Barn. and Ald. 119. 2 Stark. 408. Stone v. Whiting, 2 Stark. 235. On this point see Mollett v. Brayne. 2 Campb. 103. Whitehead v. Clifford, 5 Taunt. 518. Matthews v. Sawell, 8 Taunt. 270. 2 B. Moore, 262. (*c*) Poph. 9. Plowd. 106. (*d*) Roe *d.* Berkley v. The Archbishop of York, 6 East, 86.

of the first lease; the words or expressions not importing a surrender at that time, but a past ineffectual surrender; and such words will be confined to such antecedent act, especially as a contrary construction would defeat the intention of the parties, and operate to the prejudice of the lessee in the first lease (*a*).

The rent must be reserved to husband and wife and her heirs.

10th. The statute requires a rent to be reserved *yearly* to the husband and to the wife, and to the heirs of the wife, according to her estate of inheritance in the premises.

This reservation was not required by the common law in leases by the husband and wife. If, therefore, no such rent be reserved, so that the lease is not authorised by the statute, it will nevertheless be good during the marriage, and voidable only by the wife at her election after her husband's death (*b*).

Instance of a reservation of rent not according to the statute.

The rent was not merely intended for the husband and wife, but also for their successors to the property; and so strictly has this reservation been required, that it has been determined, that if a lease of lands were made by tenant in tail under the statute, the ancient rent of which was 10*l*., and the reservation was 5*l*. yearly, during the lessor's life, and 10*l*. a year from and after his death, the lease would not be binding under the authority of the act; because the statute requires the *whole* of the annual rent to be reserved *yearly* during the *whole* of the term, and it not having been so, but apportioned, the *power* given by the act was not well executed (*c*). This determination has been questioned, upon the ground that the rent might have been released during the life of the lessor, and that the manner of reserving it could not prejudice the issue; but admitting that to be so, the reasons given against the propriety of the decision do not appear to

---

(*a*) 6 East, 86. (*b*) Jackson v. Mordant, Cro. Eliz. 112. Hutt. 102. (*c*) Mountjoy's case, 5 Rep. 4. 6.

support it; for the lease purporting to be made under a power which it did not pursue, it follows that such lease could not take effect under the authority, and that it was in consequence so far void.

[If the reservation be not strictly in the form prescribed by the statute, the law will if possible put such a construction on it, as to make the rent payable to the person for the time being intitled to the reversion (*a*), and the lease will then be supported. In leases by tenant in tail, and in leases under powers, a reservation to the lessor and his heirs, or a reservation generally during the term will be sufficient (*b*): and it seems that the same rules will apply to leases by husband and wife. In *Hill* v. *Saunders* (*c*) the rent was reserved during the term to the husband and wife, and the lessee covenanted with the husband and wife and the heirs of the wife, for payment of the rent to the husband and wife. The wife died without having had issue in the lifetime of the husband, and it was held that her heir (though not named in the reservation) was intitled to the rent, and that the lease was within the statute.]

The rent must be such as had been customarily paid within twenty years last before the granting of the lease.

11th. The rent to be reserved yearly must be so much as, or more than had been *customarily* paid or yielded within twenty years *next before* the leases were made.

What shall be considered the rent to be reserved when it has fluctuated within the twenty years, has been rendered uncertain by the conflicting opinions of eminent judges, upon the construction to be put upon the terms "ancient or *accustomed* rent." In *Morrice* v. *Antrobus* (*d*), *Hale*, Ch. B. after observing that the statute of Henry the eighth was a pattern for the exposition of the 13th of Elizabeth, chap. 10,

---

(*a*) Sacheverel v. Frogate, 1 Ventr. 161. 2 Saund. 361. 19 Vin. Ab. 139. (*b*) Cother v. Merrick, Hardr. 89. 2 Brod. and Bing. 556. Whitlock's case, 8 Co. 69 *b*. See Sugden on Powers, 3d edition, p. 624. (*c*) 2 Bing. 112. (*d*) Hard. 325.

said "that the accustomed rent mentioned in the statute ought to be understood of the rent reserved upon the *last* lease, and not upon the first; for *that* rent having been altered since, cannot be called the accustomed rent." In *Orby* v. *Mohun* (*a*), *Holt*, Ch. J. coincided in opinion with *Lord Hale*, and considered the case of *Morrice* v. *Antrobus* of undoubted authority, and which never could be shaken (*b*). But in the same case *Lord Cowper*, Ch. expressed a different opinion, observing that it had been said "that the ancient rent is certain, by referring to the *last* rent at or next before the time of the settlement, where no lease was in being. I do not agree to that:" and he put this case—"Suppose the lands to be leased *once* at a greater, and *twice* at a less rent; I take the rent of the former leases to be the ancient rents, for the last might be made by the person that had the fee, who is not bound to reserve the ancient rent, but may let it for nothing if he pleases (*c*)." Such are the different opinions as to the meaning of the words "ancient or accustomed rents;" and when they are applied to the statute of Henry the eighth, it is presumed that the opinion of *Lord Cowper* will be found to be the most sound. In order to ascertain the fair rent, and to guard the wife and her heirs against the improvident leases of her estate by her husband at an undervalue, the act itself has prescribed a rule for ascertaining the rent to be reserved, viz. that rent at the least which the premises had been customarily letten for within or during twenty years next before the lease was made. This appears to be a very clear and distinct standard. The criterion meant to be established for fixing the rent, was that rent at which the lands had been let to tenants during the greater part of the twenty years; it

---

(*a*) 3 Chan. Rep. 56. 2 Vern. 531, 542. Prec. in Ch. 257. Gilb. Eq. Rep. 45. (*b*) 3 Chan. Rep. 67. (*c*) Ibid. 73.

was to be an average estimate. Such being the rule, it seems that *Lord Cowper*'s opinion, when applied to this subject, is the right one. Thus, if lands had been let for 200*l.* for the first eleven years of the twenty, and at 100*l.* during the remaining nine years, it is conceived that the 200*l.* would be the accustomed rent required by the statute to be reserved, and the rent which ought to be reserved in a lease intended to be made under its authority. In this view of the question *Lord Holt*'s observation, in regard to the different amounts of the rents at which the estate may have been let, applies, viz. "that the *majus* and *minus* will not be any alteration of the case, nor vary it one way or the other (*a*)."

The statute requires the accustomed yearly rent only, or more, to be reserved, but does not mention at what times of the year it is to be paid.

The rent may be reserved to be paid at one or more times in the year.

If, therefore, such rent be reserved *yearly*, whether it be made payable at different periods of the year, or once in the year only, the lease will be valid (*b*); and although there may be an omission in not reserving something which was formerly reserved, yet if the thing omitted be not an annual render, but collateral to the rent, it seems that such omission will not invalidate the lease, since the accustomed and annual rent is yearly reserved, as the statute requires.

The omission to reserve a thing collateral to the rent and not accruing yearly, will not avoid the lease.

Accordingly, in a case supported by this statute, and applicable to leases made by husband and wife of her estate, *A* being seised in right of his church of a manor (of which *B* held lands for life, at an ancient rent of 8*s.* 8*d.* payable *quarterly* and *heriotable* at the tenant's death; and copyholds holden of the manor were grantable by custom for three lives), demised the lands,

---

(*a*) 3 Chan. Rep. p. 67. (*b*) Co. Litt. 44 *b*. Doe *d*. Shrewsbury v. Wilson, 5 Barn. and Ald. 363. Hill v. Saunders, 2 Bing. 112.

upon the death of *B*, to *C* for three lives, reserving the ancient rent *half-yearly*, but *not* reserving any *heriot*; nevertheless the lease was holden to be good under the statute (*a*).

If the rent were accustomed to be paid in corn, gold, or silver, it must be so reserved, or it might be prejudicial to the wife, or her heirs, in consequence of a depreciation in the values of the media through which the rent is reserved to be paid; so that if the ancient rent was payable in *gold*, it must not be reserved in silver (*b*).

The payment of the old rent must be reserved in kind, and the amount must be specified.

The rent reserved must be specified in the lease; for if the reservation merely follow the general terms or language of the statute, it will not be sufficient. It has, therefore, been adjudged, that reservations "rendering the ancient annual accustomed yearly rent, and the rents and services, at the days and times usual and accustomed,"—or thus, "yielding and paying, therefore, the respective old and accustomed yearly rents," are not the reservations intended and required by the statute (*c*). The reason is, that the persons succeeding to the property, and to be bound by the lease under the act, ought to know what the ancient rent is, so that without hazard or difficulty they may be enabled to use the means necessary to enforce the payment of it if it were withheld, which, without such specification, they might experience great vexation and difficulty in obtaining.

What insufficient specifications from uncertainty.

Yet although the rent happen to be reserved in very general terms, still if the reservation afford a standard by which a certain amount of the rents may be ascertained, that reference will support the lease. Thus, if the reservation be of a particular sum per acre,

Yet if the rent's amount can be ascertained, the lease will be good.

(*a*) Baugh v. Haynes, Cro. Jac. 76; see also 5 Rep. 4 *b*. Palm. 106. 6 Rep. 38. Ambl. 740. Co. Litt. 44 *b*. (*b*) 5 Rep. 4 and 5 *b*. (*c*) Cro. Car. 95; and see *infra*, title "Leases of Wife's Estate under Powers in Deeds, &c." and 1 Eq. Ca. Abr. 343.

that will be sufficient; for when the number of acres are known, the amount of the rent can be easily ascertained (*a*).

When lands, demisable under the act, and others not so, are comprised in one lease, the ancient rent should be separately reserved out of the former.

It has occurred that the property demised by one lease under the statute has consisted of lands, some of which have been customarily demised as required by it, and some of them not so demised; also, in other cases, it has happened that lands usually letten separately, and at different rents, have been blended in one lease, and the ancient rents have been reserved in the gross yearly sum.

In the *first* case, if the ancient rent be reserved in respect of the lands which have been customarily let, and a rent for the remainder, the lease will be good as to the lands which had been usually demised (*b*). But if the ancient rent be not so separately reserved, then, since both the ancient and the new rents are entire, and issue out of the whole property demised, so as it cannot be said that the ancient rent is reserved out of the lands, in respect of which it was usually paid, the lease will be void, *i. e.* not authorised by the statute; and the same result will follow, as it has been decided, if the old rent only be reserved and made payable out of all such lands; for in that case the rent is not properly reserved out of the lands customarily letten, but it is entire, and issues out of those lands, and the lands demised which had not been customarily letten (*c*).

And when lands customarily letten in two farms are demised in one lease, *semble* that the ancient rents should be reserved separately.

In the second case, viz. the blending in one lease of two farms usually demised *separately*, and reserving the ancient rents in one yearly sum, it has been considered that such a lease is not within the statute, and, therefore, not protected by it; because *each* farm is liable to the *whole* rent, the reservation not directing (as it ought to have done) such proportions of it to be

---

(*a*) 3 Ch. Rep. 76; and Shannon v. Bradstreet, 1 Scho. and Lefroy, 52. (*b*) Tanfield v. Rogers, Cro. Eliz. 340. (*c*) Ley, 74, 77. Smith v. Bole, Cro. Jac. 458.

borne by each farm as were reserved when demised separately (*a*).

But suppose a lease to be made of *one* of two farms (both of which had been usually *demised together* at one rent of 200*l.*) reserving the old rent of 200*l.*, such lease would, as it seems, be protected by the statute, because the old rent and more are reserved upon the farm demised. The contrary, however, would be the case (as it is conceived) if *both* the farms had been demised, and the whole rent had been reserved out of *one* of them, since that would not be a reservation as required by the statute, and might be injurious to the wife and her successors, by narrowing their security for the rent, if not paid, but which could not happen in the former case, since the farm not demised (supposing it to be the wife's estate) would belong to her surviving her husband, and to her issue after her death, and the demise of the other farm, at so great an advance of rent, was beneficial for her and her issue; but in the second case, this reasoning does not apply, as both farms are included and would be bound during the term, if the lease were valid, and then such prejudice as above alluded to might result to the wife and her issue, by exempting one of the farms from the payment of any rent (*b*).

Whether the statute authorises a demise of a part of a farm customarily letten with a reservation of the old rent *pro rata*.

It is an unsettled question whether the husband and wife can grant by a lease, under the authority of the statute, a parcel of her estate which has been cus-

(*a*) 1 Rep. 139 *a*. 5 Rep. 5 and 6. In this case however, the security for the rent is not diminished, and since it has been decided that in the converse case of part of the premises being let at a rent *pro rata*, the lease is good (Doe v. Wilson, cited post), a lease of two farms together at the old rent, (which is in substance less objectionable) would perhaps be supported. (*b*) See Pollexf. 176. 2 Mod. 57. 3 Keb. 192.

tomarily demised entire, reserving a due proportion of the old rent that had been reserved upon the whole. It is presumed, however, that such a lease could not be supported—1st, because the act gives no direct power for partitioning the lands and reserving rents *pro rata*; 2dly, because the statute contemplates and seems to provide only for the leasing of such lands in farms which had previously been let, and upon which farms accustomed rents had been reserved;—3dly, because the consequence of giving to the act a different construction would be to defeat its intention, which was to secure the reserved rents to the person succeeding to the farms; for if such divisions of lands into farms, and of the rents, were allowed, such of the lands as were not included in the new leases would be discharged from so much of the old rents as were reserved in such leases, and then if from the insolvency of tenants, or deficiencies of distresses upon the premises demised, the rents reserved could not be recovered, wives surviving their husbands, or their heirs, would be deprived of parts of the old rents which the statute was anxious that they should receive and enjoy after the determination of the marriages; it, therefore, expressly provided "that the husband should not in any wise alien, discharge, grant or give away the rent reserved, nor any part thereof, longer than during the coverture, without it was by *fine* levied by the said husband and wife, but that the same rent should remain, descend, revert, or go, after the death of such husband, unto such person or persons, and their heirs, in such manner and sort as the lands so leased should have done if no such lease had been thereof made;"—and lastly, because the doubts which prevailed upon the validity of such leases were so strong as to induce the legislature to pass the act of 39 and 40 George the third, chapter 41, to enable Bishops, &c. to divide their ancient farms, and reserve the old rents thereon *pro*

As to husband's power to alien the rent reserved.

rata; the provisions of which statute, for reasons unknown, were not extended to the estates of married women. In addition to the above observations may be added the authority of the author of *Touchstone*, thus expressed, "If tenant in tail of land let *a part* of it that hath been accustomably let, and reserve the rent *pro rata*, or more than after the rate, this is not a good lease (*a*)."

Exceptions as to *pro rata* reservations.

There are exceptions to this doctrine from necessity:—

The case of coparceners,

Thus, in the instance of copareeners, if one of two coparceners in tail be a married woman, and the lands had been usually let for 100*l.* a year; she and her husband might demise her moiety at the rent of 50*l.*, which would be a good lease under the statute, because the interest in coparcenary is created by the act of law; the law, therefore, allows of a demise and reservation of rent *pro rata* in this case to prevent any prejudice which the one coparcener might sustain from the caprice or obstinacy of the other.

and that of the escheat of a tenancy, &c.

Again,—If a manor had been generally let at a rent of 10*l.*, and a tenancy *escheated*, the manor might, notwithstanding, be let at the same yearly rent, although the rent would issue as well out of the tenancy never in lease before, as out of the manor; so that it might be justly said that the ancient rent was not reserved, as required by the statute. The reason governing this case is the same as produced the decision in the last, viz. the escheat being the act of law, or of God, is not allowed to prejudice the rights of any person (*b*).

[In a recent case (*c*), under a power to let at the usual and accustomed yearly rents, it was held that a part of premises formerly let together might be demised at a rent *pro rata*.]

(*a*) Page 279; and the same was ruled in Mountjoy's case, 3 Co. 6. (*b*) 5 Rep. 5 and 6. (*c*) Doe dem. Shrewsbury v. Wilson, 5 Barn. and Ald. 363.

Leases not supported by the statute are to be considered as leases at common law.

Having minutely considered the particulars which are necessary to the granting of good leases under the statute of Henry the eighth, I must repeat the observation, that if they happen to be invalid under that act from not following its directions in every requisite, and the wife is a party, such leases are not void, but voidable only at her election, or at the election of her heirs, and are to be considered as demises at the common law, which have been before treated of (*a*), both when the leases were for years, and when for lives, together with the confirmation of them (*b*).

Husband and wife's power of leasing under deeds, &c.

III. With respect to powers of leasing the wife's estate reserved to husband and wife in private conveyances, it is decided that such powers are common modifications of property in land, and are to be carried into effect according to the intentions of the persons creating them (*c*). It seems to be proper and also useful to collect and briefly state in this work the results of the decisions respecting the construction and execution of such powers; especially as they are connected with the power of leasing under the statute of Henry the eighth, which has just been considered. And in order that the whole subject of leases with regard to the wife's estate may be treated upon together, I have introduced the present section in this place, although in strictness it may probably be classed under that part of this work which treats of the disabilities of coverture, and the exceptions to them.

Particulars required by the power to be observed.

All the particulars required by the power of leasing, in regard to the instrument executing it, for the authenticating of such instrument, or as a guard against imposition, or a check against precipitancy, ought to be strictly observed.

(*a*) Ante, sect. 1. (*b*) Touchst. 6, 7. *Supra*, p. 90. (*c*) The reader will find the form of a leasing power in Append. No. 1, Vol. ii. also a form of a lease under a power in Append. No. 2.

If, therefore, a seal be required, it must be fixed to the lease, for signing will not be equivalent to sealing (*a*); and if the consent or approbation of other persons be required, the assent of all of them must be obtained, unless by the terms of the power the consent of the survivors or survivor is made sufficient (*b*).

Seal.

Consent.

So also if a power of sale be given to three trustees *nominatim*, and not to the survivors by express words, and one of them dies, the power cannot be executed. But it would be otherwise if such power had been given to them by the description of trustees, without particularly naming them (*c*).

Power of sale.

A power of leasing cannot be delegated nor accelerated:—

Leasing power can be neither delegated nor accelerated.

Thus, if *A* and *B* be tenants for their lives in succession, and a power of leasing be given to *A* during his life, and *after his decease* a like power to *B*; although *A* convey all his estate to *B*, yet *B* cannot execute his power of leasing during *A*'s life, nor the power for the like purpose which was given to *A* (*d*).

Instance.

If the private power require the lands to be such as had been *most usually* let within the last twenty years, it would seem that such power, and the power under the statute of Henry the eighth, would receive the same construction in this respect, and that if the lands had been let during eleven of the twenty years, or had been in lease for a long term which expired within the last nine of the twenty years, and the estates not relet, they would be within the terms of the power;

Construction when power requires the lands to have been most usually let within the last twenty years.

(*a*) Wright v. Wakeford, 17 Ves. 459. (*b*) Atwaters v. Birt, Cro. Eliz. 856. Hawkins v. Kemp, 3 East, 410. (*c*) Townsend v. Wilson, 1 Barn. and Ald. 608. The power of sale was given to the three trustees and their heirs; the monies arising from the sale were to be received by them, or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor, and a power was given for appointing new trustees. It was held that two surviving trustees could not execute the power of sale. The decision was questioned by the *Lord Chancellor*, in Hall v. Dewes, 2 Aug. 1821. (*d*) Coxe v. Day, 13 East, 118.

the word "usually" being applicable as well to lands *continuing* in lease for a long period, as to lands which have been repeatedly demised for short terms (*a*). Again,

When the power requires the estate to have been usually letten, generally.

When the power is general and authorises lands to be demised which had been *usually* letten, it is said that they must have been let twice at the least (*b*); but it is presumed that the necessity for such lettings must be subject to the above observation upon the construction of the word "usually," as applying to a previous single demise for a long but expired term, and that the only question would be, in the absence of a particular intention, in regard to the length of time which had elapsed between the expiration of the term and the creation of the power; and probably it might not be considered inconsistent with the general intent of such a power, if in analogy to the statute of Henry the eighth, it should be held, that in case such long term ended within twenty years before the granting of the power, the lands comprised in such expired term, although not again demised, should be considered as lands in the sense of having been usually let, *i. e.* on lease, so as to be included within the terms or intent of the power (*c*).

The cases next noticed, and which have been considered at variance with each other, may probably be reconciled by the following distinctions:

When the power extends to lands usually and others not usually letten, reserving the accustomed rents; how the rent must be reserved.

1. When the power of demising extends to all the lands settled, and requires the *accustomed* rents be reserved, and some of the lands happen not to have been let; in that case, as the intention appears to give a general power of leasing *the whole* property, and it is practicable to reserve the accustomed rents upon such of the lands only as have been let, the power will

---

(*a*) Vaugh. 28, 34; and see last sect. p. 96. (*b*) 2 Roll. Abr. 261, 262, pl. 11, 12, and 14. (*c*) See Sugden on Powers, 570.

be considered well executed by leasing *the whole*, reserving the usual rent upon such of them as had been let; for the qualification annexed being inconsistent with the power given to demise *all* the property, the law of necessity only requires such qualification to be complied with *cy pres*. And with respect to the property which had not been let, it is presumed that it would be required, in reference to the intention to be collected from the power and qualification, that the fair annual value of such other property should be reserved for the benefit of the persons in remainder, who might otherwise be great sufferers by determining according to the opinions of some judges, that such property might be leased without the reservation of any rent (*a*).

As to the reservation of rent in respect of the lands not usually letten.

2. But when no particular intention appears, or when it appears from the terms of the power, or from the particular circumstances of part of the property, (suppose family mansions and lands always occupied with them by the owners), that the power was meant to extend the privilege of leasing to such lands only as *had been* or *were capable* of being let, or were *then* let; in such cases, leases will not be a good execution of those powers, if they include property which had not been or were not then let, or were incapable of being let, as the cases may happen.

But the nature of the property, &c. may exclude such a power from comprehending lands not usually letten, and then a lease including them will be void *in toto*.

Instances of the *first* class of powers.—*A* had a power to grant leases of manors and lands, *or* of *any part* or parcel of them, so that as much rent or more were reserved upon each lease, as had been reserved in respect of them within two years immediately prece-

---

(*a*) See Goodtitle v. Funucan, Dougl. 564. 2 Roll. Abr. 262. But the opinion that lands not previously let, may, if included in a power of this description, be demised without any rent, seems to be established by the authorities. Cumberford's case, 2 Ro. Ab. 262. Campion v. Thorp, Clayt. 99. Waker v. Wakeman, 2 Lev. 150. 1 Ventr. 294. 3 Keb. 547, 586, 595. Sugd. Pow. 525. See Doe d. Bartlett v. Rendle. 3 M. and S. 99.

ding. The determination was, that lands which had not been leased within the two years at any rent, might be demised in consequence of the apparent intent that power should be given to make leases of *all* the property (*a*).—Again, *A*, tenant for life, had a power of demising *all* or *any* of the manors, messuages, lands, tenements, *fisheries*, and hereditaments, for years, determinable upon three lives, so as there were reserved so much, or as great yearly rents as, or more than then was or were paid. A lease was made of the premises, including a *fishery*, which was not on lease when the power was created; the lease, nevertheless, was determined to be a due execution of the power which *mentioned fisheries*; but it is to be noticed that the rent reserved on the lease was 30*l.* more than what the premises, exclusive of the fishery, had ever been let at, so that 30*l.* was a *bona fide* reserved increased rent for the fishery (*b*).

Instances of the second class of powers.—(*c*) *A* seised of a manor in tail, with remainders over, she and her husband, *B*, demised a moiety of the manor with the appurtenances for 300 years, under a power that the donees should not alien the manor or any part of it, but only for term of life, or for years, or at will, *yielding* the *true and ancient rent*. The manor consisted of several free rents and copyhold tenements, and an *acre of waste*, &c. which was never demised before. And it was resolved, that in respect of the acre of waste, the rent, which was entirely reserved out of the *whole* property demised, could not be called the true and ancient rent. The lease, therefore, was not a good execution of the power. This is explained before, in treating of leases granted under the statute of the 32d of Henry the eighth (*d*). Again, *A* was tenant for life under a

---

(*a*) Cumberford's case, 2 Roll. Abr. 262, pl. 15. (*b*) Goodtitle v. Funucan, Dougl. 564. See also Campion v. Thorp. Clayt. 99. (*c*) Mountjoy's case, 5 Rep. 3 *b*. Moor, 197, S. C. (*d*) Ante, p. 112.

will, with a power to lease all or any of the manors, messuages, lands, tenements, and hereditaments therein mentioned for lives or years, so as the *usual rents* were reserved, and that there should not be at any one time a greater estate upon any one *tenement* than for three lives or twenty-one years. The testator was possessed of the moiety of certain *tithes* which never had been demised previously to the will. *A*, in consideration of 30*l*. demised the tithes, at a rent of 19*s*. And it was determined that the lease was void, because the tithes had not ever been demised (*a*). In this case the word "tenement" also showed that an incorporeal hereditament like tithes was not intended to be comprised in the power; which was further manifest from the circumstance of a direction that the leases should not be made dispunishable of *waste*, which was inapplicable to tithes: besides it was improbable that the testator could mean to authorise the reduction of the value of the tithes from 30*l*. to 19*s*. a year: this, therefore materially differs from the case of *Goodtitle* v. *Funucan*, before referred to; intention being the foundation of those decisions, as well as of the cases referred to below (*b*).

Distinction as to the lease's validity when it, as to *all* the lands, takes effect under the power, and when part of them belongs to the lessor in fee. In the first case it is totally void.

But the reader must attend to a distinction when the lease can only take effect *from* the power, as to *all* the property intended to be demised, and when, in addition, *other* property belonging to the lessor in fee simple is comprised in the lease, of which, therefore, he might dispose *ad libitum*. In the first case, we have seen that if the lease be a defective execution of the power by including property not within it, or by an improper reservation of rent, the lease will be void *in toto* (*c*):

(*a*) Powers v. Partington, 3 Term Rep. 665. (*b*) Vaugh. 28. Jones, 27. 3 Vin. Abr. 429, pl. 9. Fortes. 332. 8 Mod. 249. 1 Ventr. 294. 2 Lev. 150. 12 Mod. 147, 151. Carth. 429. Doe d. Bartlett v. Rendle, 3 Mau. and Sel. 99; and see Doe dem. Tennyson v. Yarborough, 1 Bing. 24. (*c*) See Cardigan v. Montagu, Sugd. pow. App. 10. Doe d. Bartlett v. Rendle, 3 M. and S. 99.

In the second it is void in part only,

but in the second case, if the power be defectively executed, the will be void only as to the lands comprised in the power, and good as to the lands of which the lessor was seised in fee; and the rent reserved will be

and the rent will be apportioned.

apportioned. Thus, it was said by *Lord Coke*, that if a man be seised of two acres; of the one in fee simple, and of the other in fee tail, and he make a lease of both for life or for years, *reserving* a rent, and then he dies, leaving issue, and the issue in tail avoids the lease, the rent shall be apportioned (*a*). According to which doctrine, the lease would be void in part and good in part. This proposition was acknowledged and acted upon by the Court of *King's Bench* in a late case of *Doe* on the demise of *Vaughan* v. *Mayler* (*b*), in which the case of *Rees* v. *Phillip* (*c*) was considered, but not approved of. The case of *Vaughan* v. *Mayler* was to the following effect:—

A being tenant for life of three acres, with a power to lease them at the ancient rent or more, with a clause of re-entry for non-payment after twenty-one days; and being also seised of lands in fee simple, demised the *whole* at an entire rent, with a clause of re-entry for non-payment of the rent for fifteen days and no sufficient distress. The power, therefore, was not well executed. The question was, whether the lease was wholly or in part void? And the Court determined, for the above reasons, that the lease was void *in part* only, viz. so far as regarded the three acres, and that the rent should be apportioned.

In this case it is observable, that the interest of the

But if the rent be reserved according to the quantity or the produce of the land, as a rent at a certain rate per acre, or a certain proportion of the produce, it may be considered as in effect a several reservation, though apparently joint, and the lease will therefore be supported as to the lands within the power. Campbell v. Leach, Amb. 740. Sugd. Pow. 623. (*a*) Co. Litt. 148 *b*. (*b*) 2 Maul. and Selw. 276. (*c*) Wightw. Exchcq. Rep. 69.

remainder-man in the three acres was protected by the partial avoidance of the lease; and at the same time justice was done to the lessee by giving to him the fee simple lands during the term, with an abatement of the rent in respect of his loss, by a superior title to the three acres.

In general a lease for years determinable on lives is not at law within a power to lease for lives.

What interest may be granted under a power to lease for three *lives* has been before mentioned (*a*). And it seems that such a power cannot in general be executed at law by leasing for years determinable upon lives (*b*), from the different natures of the estates; a term for years being a chattel interest only when the power expressly authorises a freehold interest to be given.

Relief in in equity, where the term granted exceeds the power.

But it seems that a Court of Equity would interfere in this case, and do that substantial justice in supporting the execution of the power which a Court of Law from its rules could not do; for although the instrument be void at law, yet when the intention is clear and can be effectuated, and the consideration is meritorious, equity will supply the defect (*c*).

(*a*) P. 103, and see 3 Keb. 44. (*b*) Whitlocke's case, 8 Rep. 69 *b*. Rattle v. Popham, 2 Stra. 992. (*c*) Churchman v. Harvey. Ambl. 335. Wykham v. Wykham. 18 Ves. 395. See Parry v. Brown, 2 Freem. 171. 3 Ch. Rep. 610. Nels. 87. Sugd. Pow. 550, and the cases there cited, from which it appears that if the lease be granted for a term beyond that authorised by the power, the excess being distinguishable, it will be supported in equity, to the extent to which it is warranted by the power. And when a lease or agreement for a lease in writing is made, which is in its substance conformable to the power, but defective in the mode of execution by the omission of the solemnities required, it will in equity be made good against the remainder-man. Campbell v. Leach, Ambl. 740. Thannon v. Bradstreet, 1 Sch. and Lef. 52. 7 T. R. 480. It was also held in Campbell v. Leach that the same relief was to be given to the lessor, where his lease was void at law from the existence of a prior lease, which had been in fact given up, though not actually surrendered. But this principle is not extended to tenants from year to year, as a demise from year to year by a tenant

Formal defects in leases under powers relieved in equity.

In relation to the interest which may be granted at law under a power to lease for three lives, *Whitlocke*'s case (*a*) makes the following distinction:

Rule in Whitlocke's case when leases for years determinable on lives may and may not be granted.

If the power to lease be general, affirmative and absolute, with a separate restrictive clause or proviso added, that the lease shall not exceed three lives or twenty-one years, as if *A* had a power to grant leases provided they did not exceed three lives or twenty-one

---

for life, with a leasing power, cannot in general be understood as intended to operate as an execution of the power. Ex parte Smyth, 1 Swan. 337. Nor does it extend to a parol agreement for a lease, in part performed during the time of the tenant for life; the acts of part performance being done without the concurrence of the remainder-man, do not preclude him from insisting on the statute of frauds. Blore v. Sutton, 3 Mer. 237.

Whether tenant at rack rent will be relieved from defects in execution of a leasing power.

It was been considered that a tenant at rack rent, holding under a lease granted by virtue of a power, is not looked upon as a purchaser, so as to be intitled to the aid of equity to supply a defect in the execution of the power, unless he has been led to expend money on the estate. 2 Freem. 224. Sugd. Pow. 372. But in the latter cases, the proposition that a contract for a lease by the tenant for life was binding on the remainder-man, has been laid down in general terms, without any exception as to leases at rack rent. 1 Seh. and Lef. 62. 3 Mer. 247. The case of ex parte Smyth was decided upon different grounds. Upon principle it would seem that a lease at rack rent ought to stand on the same footing as any other agreement for a valuable consideration. The argument in favour of the distinction is, that the tenant paying the full value of the land during his occupation of it, experiences no injury from the eviction. But it is difficult to sustain this reasoning, when by filing his bill to have the lease perfected, he asserts that he considers it for his advantage to continue it.

Substantial defects in leases under powers not relieved in equity.

Where the objection to the execution of a leasing power arises from the substance of the contract between the lessor and lessee not being conformable to the power, it appears that no relief can be given in equity, except in the single case mentioned above, of an excess in the quantity of interest granted, where that excess is distinguishable. Thus, where the lease was void at law from the insertion of an unusual covenant, a bill in equity against the remainder-man to reform the lease by striking out the covenant in question was dismissed. Sandham v. Medwin. cit. Sugd. Pow. 372.

(*a*) 8 Rep. 69.

years; in that case a lease for ninety-nine years if three lives should live so long would be a due execution of the power. But when the power of leasing is entire, particular, and negative, as to make leases *for* three lives or twenty-one years, there the lease must be either *for* twenty-one years or for three lives, so that a lease for ninety-nine years determinable upon three lives will not be valid: and so it was adjudged by the Court of *King's Bench* in *Roe.* d. *Brune* v. *Prideaux* (*a*). The power authorised leases for any number of years, not exceeding twenty-one, or *for* the life or lives of any one, two, or three person or persons, so as no greater estate than *for* three lives should be at any one time in being in any one part of the premises. The leases granted under the power for ninety-nine years determinable upon the survivor of two lives: and the Court determined, that such leases were not a due execution of the power.

Instance of a valid lease for three lives, *or* thirty-one years.

If the power be for three lives or thirty-one years, and a lease be made for three lives, *or* thirty-one years, *whichever shall last the longest*, this is a good execution of the power (*b*).

The manner in which the old or accustomed rent is to be reserved on leases has been before discussed in treating upon those made under the statute of Henry the eighth (*c*); but since cases occur upon private powers which cannot fall within the power granted by that statute, this subject will require further consideration.

When times of payment of the old rent must be observed.

If the old rent has been usually paid at the four quarters of the year, and the power does not expressly require the reservation to be made yearly, the rent must be made payable quarterly (*d*).

And when lands not be-

If the power go farther, and require the best and most improved yearly rent to be reserved upon such of

---

(*a*) 10 East, 158. (*b*) Commons v. Marshall, 6 Bro. Parl. Ca. 168. *oct. ed.* See the remarks on this case in Sugden on Powers, 551. (*c*) Ante, p. 110. *et seq.* (*d*) 5 Co. 6.

fore leased are included in the demise, the old and new rents should be separately reserved.

the lands as had not been usually let, it seems that both the old and new rents should appear in the lease, if one only be granted (*a*); and since the question whether the new rent is or is not the best and most improved rent is a mere matter of fact, it is to be determined by a jury (*b*).

If the best rent be required to be reserved by the power, mere inadequacy in amount will not always avoid the lease.

In *Doe* dem. *Lawton* v. *Radcliffe* (*c*), the Court said that where the transaction was fair, and no fine or other collateral consideration was taken by the tenant for life leasing under the power, or injurious partiality manifestly shown by him in favour of the particular lessee; there ought to be something extravagantly wrong in the bargain in order to set the lease aside for inadequacy of rent. Accordingly, in the case referred to, evidence was given that the tenant for life had two offers, before he made the lease impeached, at rents in some degree exceeding that reserve, and required by the power to be the *best*. A jury to whom the matter was referred found a verdict establishing the lease, and upon the motion of the remainder-man for a new trial upon the above offers, it was refused; because the letting was bonâ fide, and it was the lessor's interest to get the best rent which could be obtained, regard being had to the ability and good management of the tenant, which were circumstances to be considered in fixing the amount of rent.

What reservations bad for uncertainty.

Since for the reasons before stated (*d*) the amount of the rent reserved is required to be mentioned, or to be so reserved as to be easily ascertained; if the reservation of it merely follow the words of the power it will be defective;—thus, such uncertain reservations as, "yielding and paying the several and respective old and accustomed rents reserved and payable for the

---

(*a*) Ante, p. 112. (*b*) 7 East, 279. Doe d. Bromley v. Bettison. 12 East, 305. (*c*) 10 East, 278. (*d*) Ante, p. 111.

same" (lands usually letten), or "such sum and sums of money as shall amount to the most and best improved yearly rent that can be reasonably had or gotten for the same" (lands not usually letten), will, from the uncertainty, invalidate the leases (*a*).

The consequence will be the same, if, from the natures, kinds, and quantities of the different properties comprised in a lease, it is impossible to discover whether the rent is or is not the best which could be procured from each description of them.

If the best rent be properly reserved, and the lease valid, the lessee's covenant to expend a sum of money in *improvements*, in addition to the payment of rent, will not, in the absence of fraud or collusion between him and his lessor, vitiate his lease, as would be the case if such sum were to be considered as a fine to be received by the grantor (*b*).

But the lessee's covenant to expend a sum in improvements will not vitiate the lease.

But the question in all these cases is, has or has not the best yearly rent been reserved? if so, then the interests of the persons in remainder have been preserved; and agreements or covenants, which (until that circumstance was ascertained) might render doubtful the fact of the reserved rent being the best, will not be allowed to vitiate the grants;—Accordingly—

In *Doe* dem. *Bromley* v. *Bettison* (*c*), the power required the best and most improved yearly rent to be reserved. The rent, at which the lease was granted, was found by a jury to be the full value of the premises at the period of the demise. The lessor covenanted to do landlord's repairs, or in default, the lessee was to be at liberty to do so, and to deduct the amount of expense out of the rent; yet the Court held that such covenant did not avoid the lease, as the jury had found that the best rent had been reserved.

Nor his agreement to do landlord's repairs upon the latter's neglect, &c.

(*a*) Duchess of Hamilton v. Mordaunt, 6 Bro. Parl. Ca. 145. Ante, p. 111. (*b*) 1 Scho. and Lefroy, 52. (*c*) 12 East, 305.

Fines not to be taken by lessor when forbidden by the power.

Connected with the above subject is the taking of *fines;* and when forbidden by the power, they must not be taken either directly or indirectly, since the effect would be to the prejudice of the remainder-man, by depriving him of the reservation of the fair and full rent for the premises during the demise; so that in deciding upon the fact as to what is or is not a fine, or in the nature of one, when not expressly taken or reserved as such; the intention of the parties, the nature of the transaction, and the injury (if any) to be sustained by the person in remainder, are necessary to be taken into consideration.

Instance where a lease was supported against the supposed taking of a fine, the Court not considering the benefit a fine.

Thus where a power required that upon every lease there should be reserved payable during the continuance of it the best and most improved yearly rent, &c. without taking any sum or sums of money, or other thing, *for* or *in lieu* of a fine or income for the same; a lease was granted on the 15th of *October*, and by the stipulation of the parties payment of half a year's rent became due upon the 11th of *November* following. One of the questions was, whether such stipulation and reservation of the first half year's rent, being only twenty-seven days after the lease was granted, were not in effect taking a sum of money for a fine so as to invalidate the lease? But it was determined in the negative; first because no fine was in contemplation of the parties, nor was any in fact *taken* within the *letter* of the power; and secondly, because the half year's rent was reserved by the lessor to compensate him for an antecedent occupation, and could not in any way deprive the remainder-man of any portion of his interest (*a*).

[Where under a power to let at the best improved rents, a lease was made commencing on the 14th of *September*, and the rent was reserved payable on the 25th of *March* and 29th of *September*, the first pay-

(*a*) Isherwood v. Oldknow, 3 Maule and Selw. 382.

ment to be made on the 25th of *March* next ensuing, the lease was held void, on the ground that there would be no rent payable to the remainder-man from the 25th of *March* preceding the expiration of the term to the 14th of *September* (*a*). But a similar lease was held good, under a power to let at the usual and accustomed rents, where the rents had formerly been reserved payable on the same days (*b*).]

When fines may be taken or reserved.

But when the taking of fines is not prohibited, and the words of the power are sufficiently comprehensive to include them, as when the *usual* or best rents are directed to be reserved for the lands which had been usually demised, and they had been customarily let at fines, and a yearly rent; in such cases if fines and the usual rent or more be reserved the lease will be good (*c*). Accordingly—

A being seised of lands, &c. in *B* and *C* and in *D* and *E*, empowered by his will *F*, the tenant for life, to demise them thus,—the lands in *B* and *C* for any term not exceeding twenty-one years, with a reservation of the *most* rent for the same; and the lands in *D* and *E* for any term not exceeding sixty-one years, with a reservation of the *usual or* other the most rent that could be procured. At this time the lands in *D* and *E* were on lease at 6*l.* rent, and for which a fine of 100*l.* had been given. After the surrender of this lease, *F* demised them for sixty-one years at a rent of 10*l.* and a fine of 150*l.* This lease having been also surrendered, *F* granted the lease in question for sixty-one years in consideration of a *fine* of 315*l.*, and at the rent of 10*l.* The best yearly rent, which was 50*l.*, was not reserved;

(*a*) Doe d. Wilmot v. Giffard, cited, 5 Barn and Ald. 371, *contra*. 2 Ld. Raym. 1198. A similar objection might have been raised in Isherwood v. Oldknow, 3 M. and S. 382, the lease not determining as to one part of the premises till the 12th of May, and no rent being payable after the 25th of March. (*b*) Doe dem. Shrewsbury v. Wilson, 5 Barn and Ald. 363. (*c*) 3 Burr. 1441.

so that the lease would be void if it could not be supported by the alternative in the power, viz, the reservation of the *usual* rent: and it was decided that since more than the usual rent was reserved, and fines had been usually taken, which must have been known to the testator when he made his will, and as the interest of the remainder-man had been improved by the increased rent, the lease was a good execution of the power; it being both within the terms of such power and according to the intention of the testator (*a*).

When the rent reserved may be a part of the produce and not money.

The nature of the property demised must explain the word "rent." Suppose then the subject to be lead, copper, or coal mines; if the rent be reserved in part of the produce, and not in money, the reservation will be proper (*b*).

Reservation of the rent generally the safest mode.

And it seems from *Whitlock's* case (*c*), that it is the best and safest method to reserve the rent generally during the term, and then the law will make the distribution.

Besides the proper reservation of rent, there are other circumstances which, if not attended to, will avoid leases granted under powers.

Covenants, &c. required by the power must be inserted in the lease.

If therefore the power require particular covenants and clauses to be inserted in the leases, the directions must be implicitly complied with; for since a power of leasing for a long term is a privilege to the tenant for life, so also the qualifications annexed to it are meant as guards and checks upon such power, to prevent abuse, and in favour of the remainder-man. Such qualifications, therefore, are required by the law to be strictly attended to.

[But the strictness of this rule has been considerably relaxed by the late case of *Doe* dem. *Jersey* v. *Smith* (*d*),

---

(*a*) Doe d. Newnham v. Creed, 4 Maule and Selw. 371. (*b*) Campbell v. Leach, Ambl. 740. (*c*) 8 Rep. 71, vid Ante, p. 108. (*d*) 5 M. and S. 467. 1 Brod. and Bing. 97. Ibid. vol. ii, p. 473. 7 Price, 281. 3 B. Moore, 339. Ibid. vol. v. p. 332.

which has established that a reasonable compliance with the directions of the power is sufficient, and that where the insertion of a particular proviso is required, it will not invalidate the lease to qualify that proviso in a manner which is usual, and which does not substantially prejudice the remainder-man.]

That case, so far as it is considered necessary to be here stated, was as follows:—

A and *B*, his wife, were under their marriage settlement tenants for life in succession of her estate, with powers, as they severally came into possession or became entitled to the rents, to grant leases in possession or reversion for three lives, or for years determinable on three lives, of such of the lands as were so demised at the date of the settlement, at the ancient and accustomed yearly rents, &c. "provided that there was contained in every such lease a power of re-entry for non-payment of the rent reserved." *A* and *B* were also empowered as they respectively came into possession to grant leases for twenty-one years in possession at the rents then paid, or at those equally beneficial, or at the best improved rents, &c. "so that in every lease there was contained a clause of re-entry if they should be in arrear for twenty-eight days." *A* and *B* had a farther power of demising mines in possession for thirty-one years at the best reserved rent, but the power was silent on the subject of re-entry. A term of part of the estate determinable on lives having fallen in, *A* in exercise of his first power of leasing demised the premises to *C* and *D* for ninety-nine years, if *C* and *D*, or either of them, should so long live, at the rent of *2l.* payable half yearly, together with some trifling reservations of duties and services. In the lease was inserted a clause of re-entry, "if the rent, &c. should be behind for *fifteen* days, and there should be *no sufficient distress* upon the premises." The Jury found that the lease was made according to the usual and accustomed forms of leases of the same lands which contained similar provisos of re-entry.

The question was, whether the right of entry reserved by the lease was such as was required by the power? Two of the Judges of the Court of *King's Bench* only delivered opinions and decided in the affirmative. Upon a writ of error to reverse this judgment the cause was heard in the *Exchequer Chamber* by seven Judges; four of whom held, that the right of re-entry, as reserved in the lease, was not in conformity with the power; therefore the judgment of the two Judges of the Court of *King's Bench* was reversed.

[Upon an appeal to the House of Lords, the twelve Judges delivered their opinions. Five were against the validity of the lease; but seven of the Judges, the *Lord Chancellor*, and Lord *Redesdale*, held it to be a due execution of the power, and the judgment of the *Exchequer Chamber* was consequently reversed.

When former leases may be received to explain the power.

In this case the majority of the Judges were also of opinion that the former leases were properly received in evidence. With respect to the leases in existence at the date of the settlement, it was considered that as the settlement referred to them (*a*), and as they showed the nature of the estate and interest which the settler had at the time (*b*), they were admissible to explain the sense in which the words "a power of re-entry" were used. And assuming that a reasonable power of re-entry only was intended, the former leases generally might be looked at to show what had been usual, usage being of great weight in determining what is reasonable (*c*).

The decision in *Doe* v. *Smith* has been followed in another case(*d*), where under a similar power the lease contained a proviso for re-entry, in case the rent should be unpaid for twenty-eight days, being lawfully demanded. This appeared to be conformable to a former

---

(*a*) Brod. and Bing. 603. (*b*) Ibid. 550. (*c*) 5 M. and S. 480. 2 Brod. and Bing. 593. (*d*) Doe d. Shrewsbury v. Wilson. 3 Barn. and Ald. 363.

lease in existence at the time of the creation of the power; and it had been held (*a*) that under the statute 4th Geo. II. c. 28, the landlord was at liberty to enter without demanding the rent, although a previous demand was required by the lease.]

What covenants, &c. ought to be inserted when the powers are silent upon those subjects.

If the power merely give directions as to the rent to be reserved, in that case every covenant and clause should be inserted for the recovery of it for the benefit of the remainder-man, as a covenant to pay the rent, a condition of re-entry, and a counterpart should be executed by the lessee (*b*). And if the lease be a building lease, it is presumed that a covenant to rebuild should be inserted (*c*).

[Thus it seems that a clause limiting the power of distraining for rent would invalidate the lease. But where it was provided that if the rent should remain unpaid after reasonable demand, the lessor might enter and distrain, and detain and keep the distress till the rent should be satisfied, it was held that this proviso being for the benefit of the lessor did not abridge the power of distress at common law, or of selling the distress taken, under the statute; but that he might distrain without demand, and sell: and the lease was therefore supported (*d*).]

And when the powers require the insertion of all usual covenants, &c.

When the power goes farther, and requires all clauses, covenants, &c. to be reserved, which are *usual* in such like leases, and that the leases should not be without impeachment of waste, care must be taken that such leases include all such particulars, and that the deeds are not so framed as to enable the lessee to commit waste; also that no unusual covenant on the part of the lessor is inserted, as to rebuild, &c. if the pre-

No unusual covenant on the part of the lessor should be inserted.

(*a*) Doe dem. Scholefield v. Alexander, 2 Maule and Sel. 525. (*b*) Taylor v. Horde, 1 Burr. 60—125. (*c*) Jones v. Verney, Willes, 175. (*d*) Doe d. Shrewsbury v. Wilson, 5 Barn. and Ald. 363.

Circumstances under which lessor's covenant to renew did not invalidate the lease.

mises be blown down or destroyed by fire, which has been determined to be an *unusual* covenant (*a*).

But in the case of *Doe* v. *Bettison*, before in part stated (*b*), the lessor, in consideration of 1000*l.* to be laid out in repairs by the lessee, covenanted that he would at all times during his life, upon request, at the lessee's expense, renew the lease for twenty-one years at the *same* rent, &c.; yet since the Jury, who had found the rent reserved to be the best, did not find the covenant to be unusual (the power in that case having required the insertion of such covenants, &c. as were generally inserted in leases according to the custom of the country), and as upon renewal, if the then best rent should not be reserved, the renewed lease would be void, and the person in remainder might bring an ejectment and recover the premises, the Court determined that such covenant did not invalidate the then present lease.

As to leases in possession and reversion.

If leases in reversion are granted when leases in possession only are authorised, that circumstance will invalidate them. It is therefore necessary to ascertain when powers warrant the granting of leases in possession and when in reversion. The following conclusions may be probably drawn from the several cases upon the subject :—

When leases in possession only can be granted.

Suppose the estate in settlement to be *in possession*, and the power to be general to grant leases for twenty-one years, but not expressing whether they should be granted in possession or reversion; in that case, leases *in possession* only can be granted. The reason is, that if under the power leases in reversion were permitted, so many of them might be made as in effect to disinherit the persons in reversion or remainder (*c*). And

(*a*) Ambl. 740. Ellis v. Sandham. 1 Term Rep. 705. (*b*) *Supra*, p. 127, and see 12 East, 305. (*c*) Fitzwilliam's case, 6 Rep. 33. Slocomb v. Hawkins, Yelv. 222. Sussex v. Wroth, Cro. Eliz. 5.

if there be a subsisting term for years at the time of the power, or if not, and the donee of the power make a lease for 21 years, he may in either case, during the term, make another lease for 21 years, *to commence immediately*; provided it give no beneficial interest during the subsisting lease, because both the terms are running out together, and neither of them can exceed the term of 21 years (*a*).

When leases in reversion may be granted under a general power.

If the settled estate be *reversionary*, *i. e.* subject to terms for lives or for years, and the power to lease be general for twenty-one years, it seems that leases in reversion, viz. to commence from the expiration of those terms, may be granted, and from necessity, in order that the power may not by the contrary construction be rendered nugatory; a presumption also arising from the state of the property, that the creator of the power, from his knowledge of the subsisting terms when he granted the power, intended to enable the donee to grant leases in reversion (*b*).

Not when the power restricts them to leases in possession.

But if the power expressly declare that leases in *possession* only shall be granted, it seems that whether the estate be reversionary or in possession, leases in *possession* alone can be granted, because the power is express and obligatory (*c*).

Construction in regard to leases for lives under a power to grant in reversion.

When a power is given to grant leases for lives or years in *reversion*, if the power be exercised by the grant of a lease for *lives*, then, since no freehold interest can be made to commence *in futuro*, the lease, in a sense reversionary, will be considered as a concurrent lease, *i. e.* a lease to commence in *possession* when the rever-

---

Sheconb v. Hawkins, Cro. Jac. 318. Doe dem. Copleston v. Hiern, 5 M. and S. 40. (*a*) Edwards v. Slater, Hard. 412. Read v. Nash, 1 Leon. 147. Goodtitle v. Funucan, Dougl. 565. Brune v. Prideaux, 10 East, 185; but see Sugden on Powers, 595. (*b*) 2 Roll. Abr. 261, pl. 8. 1 Lev. 168. Opey v. Thomasius, T. Raym. 134. 1 Leon. 35. Coventry v. Coventry, Comyn, 312. Northampton's case, Dy. 357. See Sugden on Powers, 584. (*c*) Sid. 260. 1 Lev. 168.

sion falls in, but beginning in *interest* immediately from its date, and consequently it will be a valid lease (*a*).

How leases should be granted under powers authorising leases in possession and reversion.

In cases where the power authorises leases in possession, and also leases in reversion, it can only be properly executed *reddendo singula singulis*, viz. by the grant of leases in *reversion* of lands not then in *possession*, and of leases in possession of the lands then in possession (*b*).

[In a late case (*c*) the power authorised leases for 99 years to take effect in possession or immediately upon the determination of the subsisting leases. The premises being subject to a lease to expire in four years, the tenant for life granted at the same time to the same person two leases, one for thirty years, to commence on the expiration of the then subsisting lease, and the other for sixty-three years, to commence at the expiration of the term of thirty years. The second lease was held to be void.]

Destruction of powers of leasing by alienation of the estate,

A feoffment, fine, conveyance, or surrender by the tenant for life of his whole estate, will destroy the power of leasing, because the power being appendant to the estate for life, that estate being gone, all adjuncts expire with it (*d*). But with respect to married women, if they do not join with their husbands in a fine or recovery, it follows from what has been before said in regard to the wife's right of entry under the statute of Henry the eighth, that if they enter after the deaths of their husbands, in cases where the latter have aliened the estates of the former, the re-possession of such estates will revive the powers of leasing.

except when the alienation is by the husband alone of his wife's estate.

(*a*) Com. 39. 1 Ld. Raym. 269. (*b*) Com. 40. (*c*) Doe dem. Sutton v. Harvey, 1 Barn. and Cress. 426. (*d*) This point is more fully considered in chapter xvi, which treats more generally of powers.

CHAPTER IV.

THE subjects considered in this chapter are—

I. *The power of the husband to charge his wife's real estates with the payment of his debts, &c.*
II. *His wife's equity to have her estates so charged exonerated out of his assets; and*
III. *The effect when the equity of redemption is reserved, not to the wife but to the husband, &c.*

Husband alone may charge his wife's estate during their joint lives, or during his interest as tenant by the curtesy.

I. From the interest which the husband acquires by the marriage in the real estates of his wife, it follows that he *singly* can charge them at law with his debts during their joint lives, but if he were the survivor, and intitled to be tenant by the curtesy, then the charges would continue during his life; at the conclusion of which period they must necessarily expire with his interest in the estates.

Effect of the wife's joining in a mortgage by demise.

But if the wife join with her husband in incumbering her estate by demise for a term of years, by mere deed without a fine, the lease will be so far good as to be *voidable* only by her after her husband's death, so that it may be confirmed by her by acceptance of rent, &c. as has been before mentioned in treating of leases granted by her and her husband at common law (*a*).

Thus, in *Goodright* v. *Straphan* (*b*), *A*, in right of *B*, his wife, being seised in fee of the reversion of three

---

(*a*) Ante, p. 91. Sed. vide post, p. 139, *in notis*. (*b*) Cowp. 201.

houses expectant upon the life estate of *C*; they, *A* and *B*, demised them by deed without fine to *D*, for ninety-nine years, at a pepper-corn rent, from *C*'s death, to secure a sum of money; and the equity of redemption was reserved to *A* and *B*. *A* died, and afterwards *B* allowed in account *interest* upon the mortgage, and *surrendered* one of the houses to the executors of the mortgagee, and directed one of the tenants to attorn, and pay his rents to them. It was determined that by the act of surrender, and the directions to attorn and pay rent to the executors of the mortgagee, the lease was acknowledged by the wife as her own, and that the above circumstances amounted to a confirmation of it, upon the ground of their being equivalent to a redelivery of the deed.

But in a prior case of *Drybutter* v. *Bartholomew* (*a*) receipt of profits and payment of *interest* by the widow, were not allowed to confirm the title of the mortgagee. That case was as follows:—

The husband, in right of his wife, was seised in fee of a share of the New River water, and they joined in a mortgage by lease for 1000 years, by deed without fine, reserving a pepper-corn rent. The husband died, and then the widow received the profits and *paid the interest*. The mortgagee filed a bill to foreclose, and insisted that payment by the widow of interest confirmed the lease. But the Master of the Rolls dismissed the bill, admitting that if a *rent* had been reserved, the acceptance of it would have confirmed the lease.

The reasons upon which this case was decided do not appear satisfactory;—first, because the wife having joined in the lease, it was not void, but *voidable* only;—secondly, because the law is the same whether any rent were reserved or not;—and lastly, because the same reason which makes the acceptance of rent a confirma-

---

(*a*) 2 P. Will. 127.

tion, applies to the fact of the payment of interest; for as the widow was not liable to the debt, if nevertheless she paid the interest of it, that circumstance must be considered as an acknowledgment of the debt affecting her estate, and consequently a confirmation of its accessary the charge and security, and the adoption of them as her own. It is conceived, therefore, that notwithstanding the last case, payment of interest by the widow upon a debt charged on her estate by her husband, would be considered as a confirmation of the security (*a*).

The security on the wife's estate will be valid if she and her husband effect it by fine.

The wife is not, as we have before seen, wholly precluded from disposing of her real estates during the marriage. If, therefore, she join with her husband in levying a *fine* of her estate to raise money to pay his debts, or otherwise to answer his engagements, the security will be good, and obligatory upon her and her husband, and all persons claiming under them; for although the law protects the wife during the coverture so as to invalidate the alienation of her property by private conveyances, unsupported by any particular

---

(*a*) This conclusion is however very questionable. It is not supported by Goodright v. Straphan; for in that case the Court does not appear to have considered the payment of interest as of any effect against the wife. It was held that she could not be bound, except by something amounting to a redelivery of the deed, and the decision was founded upon an opinion that the acts done by the wife to put the executors of the mortgagee into possession of the premises were equivalent to a redelivery of the deed. In Drybutter v. Bartholomew, it was only held that the wife was not bound by payment of interest, and the decisions are therefore not inconsistent, unless it could have been said in the latter case, that the payment of interest was an implied delivery of the deed. It may, perhaps, be doubted whether the acts done in Goodright v. Straphan ought to have been considered equivalent to a re-execution of the deed; but it could scarcely be contended that payment of the interest could have that effect. Upon principle it would seem singular if the wife were rendered liable to a debt, not due from her, by a mistaken payment of interest upon it.

custom, lest she might act imprudently, and against her inclination, under the influence of her husband; yet, if upon reflection and due consideration she be anxious to dispose of her estate for her husband's benefit, and express her desire to do so upon a separate and private examination in a Court of Justice, and after proper information has been given to her of her rights, and of the effect of the act which she is about to execute, then after such solemnities and safeguard, the law allows her to pass her estate either absolutely, or as a security for money, as the case may be. A fine is attended with all these ceremonies; by it, therefore, she is permitted to convey her real estates whether they be legal (*a*) or equitable interests (*b*). For the same reason she may convey by common recovery (*c*).

And by special custom without a fine.

But by immemorial custom prevailing in particular places, a bargain and sale, &c. by the husband and wife, when she is examined according to such custom, will bind her and those claiming under her, and be equivalent to a fine (*d*), and such conveyances are also protected by an act of parliament passed in the 34th year of the reign of King Henry the eighth (*e*).

[The fine of a married woman will bind her contingent interests or expectancies by estoppel (*f*).

Declaration of uses of fine or recovery.

The declaration of the uses of a fine or recovery levied or suffered by husband and wife should be made by them jointly. If made by the wife alone it is void (*g*). But if a declaration of uses be made by the husband alone, either before or after the fine or recovery, the wife's agreement to it will be presumed, unless the contrary appears by some manifest signs of her dissent; and this presumed assent will give it vali-

---

(*a*) 1 Roll. Abr. 347. (*b*) Forrest. 41. (*c*) 10 Co. 43, *a*. Incledon v. Northcote, 3 Atk. 430. (*d*) 2 Inst. 673. (*e*) Chap. 22. (*f*) Helps v. Hereford, 2 Barn and Ald. 242. (*g*) Johnson v. Cotton, Skin. 275.

dity (*a*). Her dissent may be evidenced by acts *in pais*, as by refusing to join in the declaration of uses executed by her husband (*b*), or by her declaring other uses. But to render the husband's declaration of uses ineffectual, it seems necessary to show that she did not agree to it at the time, and therefore her dissent, declared sometime afterwards, and after his death, is not sufficient to avoid it (*c*).

When the husband and wife make declarations of uses which are entirely different, both will be void (*d*), excepting that the husband's interest is bound by that which he has made (*e*). If their declarations of uses differ as to the first limitations, but agree as to those in remainder, both are void (*f*), though it has been suggested that the ulterior limitations may take effect as springing uses (*g*). If they agree as to part of the land, they will be good as to that part (*h*), and it would perhaps be held by analogy, that if they agree as to the first uses, but differ as to the subsequent limitations, they would be good, so far as they coincide, though this point does not appear to have been decided (*i*).

Effect of fine by feme covert alone.

The wife is not competent to levy a fine without the concurrence of her husband, and therefore if it appears by the record of a fine that it was levied by a married woman alone, it will be voidable for error in the record, and will not bind her or her heirs (*k*). But if she levy a fine as a feme sole, not disclosing the fact of her coverture on the record, and the fine be not avoided by the husband, it will be binding on her and her heirs, as they are estopped from averring against the record,

---

(*a*) Beckwith's case, 2 Co. 56. Swanton v. Raven, 3 Atk. 105. Gilb. Uses, 40. Owen, 6. (*b*) Webb v. Worfield, 22 Vin. Ab. 232. (*c*) Dyer, 290. 3 Atk. 105. See Preston on Conveyancing, vol. i, p. 314. (*d*) 2 Co. 57. (*e*) Moor, 196. Gilb. Uses, 40. (*f*) 2 Co. 58. (*g*) Preston. Conv. vol. i, p. 317. (*h*) 2 Co. 58. (*i*) See Preston. Conv. vol. i, p. 314. Gilb. Uses, by Sugden, 41, *n*. (*k*) 1 Sed. 122. 1 Taunt. 38.

that she was a feme covert (*a*). The husband may, however, during the coverture, defeat the fine thus levied, and it is then avoided *in toto*, and the former uses restored. If the husband is intitled to be tenant by the curtesy, he may also enter after the wife's death (*b*); but in this case it is said that the fine is only avoided to the extent of his interest (*c*).

Fine by feme covert alone sometimes permitted.

In some instances married women have, under particular circumstances, been permitted to levy fines alone, as if unmarried. In these cases the Court does not make any order to sanction or give validity to the fine, but it is left open to the husband to defeat it (*d*).]

Husband and wife may surrender copyholds.

So also a surrender by husband and wife of copyholds, when she is duly examined, will bind her and her heirs (*e*). But the husband must be a party, or consent to the surrender (*f*), unless the copyholds be settled to the wife's separate use, and then, according to *Compton* v. *Collinson*, her sole disposition of them by surrender will be good (*g*).

(*a*) Hob. 225. 2 Bro. C. C. 388. In Compton v. Collinson, 1 H. Bl. 343, it was denied that the fine in this case operates by estoppel, but it was not considered that the fine owes its effect to the misstatement on the record, which the wife and her heirs are not at liberty to set right. (*b*) Shep. Touch. 7. (*c*) Preston. Conv. vol. i, p. 255. See Vin. Ab. Fine. T. pl. 4. 10. (*d*) Moreau's case, 2 Bl. 1205. Stead v. Izard, 1 N. R. 312. Exparte Abney, 1 Taunt. 37. Exparte St. George, 8 Taunt. 590. Preston. Conv. vol. i. p. 254. (*e*) Dyer, 363, *b*. (*f*) Stevens v. Tyrrell, 2 Wils. 1. (*g*) 1 Hen. Black. 334. The judgment in this case was founded partly on the opinion, since exploded, that a feme covert might, after articles of separation, be considered at law as standing in the situation of a feme sole, and partly on the ground that a surrender by the wife alone might bind her and her heirs by analogy to the operation of her fine, an analogy disclaimed in other cases. 2 Wils. 2. 1 Ves. sen. 230.

Surrender of copyholds by feme covert alone.

It seems that a special custom may authorise a surrender by the wife alone, with the assent of the husband. Taylor v. Phillips, 1 Ves. sen. 229. Watkins on Copyholds, vol. i, p. 64. Gilb. Ten. 322. But a custom for the wife to dispose of her copyhold estate by surrender, without the husband's assent, is bad. Stevens v. Tyrrell, 2 Wils. 1. Where by custom the husband

If then the wife suffer a sum of money to be raised out of her estate, and join in a fine or some such customary conveyance as before alluded to for the purpose, and the *trust* be declared to raise the money by sale or mortgage for her husband's benefit; this will be considered as a disposition in his favour of so much of the inheritance absolutely, and subject to no after-reckoning or claim of the wife, or of any person claiming under her (*a*). But—

II. When the transaction between the husband and wife is merely to pledge her estate to raise a sum of money for him to answer his necessities, or to pay one or more of his debts; in such case, whatever may be the legal effect of the mode adopted to carry the purpose into execution, a Court of Equity will confine its operation to the true intent of the parties: and since the money was borrowed for the husband upon his wife's estate, she will be considered in the nature of a surety, and intitled to have such estate exonerated out of his assets.

The wife joining her husband in a mortgage to raise money for him will be entitled to exoneration out of his estate.

Thus in *Tate* v. *Austen* (*b*), *A* being seised in right of *B* his wife, borrowed 500*l.* to supply his occasions, and particularly to buy a commission in the army. In order to secure repayment of the sum, *A* and *B* by fine created a term of 500 years out of her estate, and subject thereto, the estate was limited to the use of *B* in fee. *A* covenanted to pay the 500*l.*; and *Lord Cowper* determined that *A*'s personal estate was liable to exo-

---

and wife may surrender to the use of her will, the wife being separately examined, her will, without a previous surrender will not be effectual: the surrender not being merely formal in this case, is not dispensed with by the statute, 55 Geo. 3, c. 192. Doe dem. Nethercole v. Bartle. 5 Barn. and Ald. 492. The separate examination of the wife for the purpose of surrendering may, by custom, be taken before two tenants of the manor out of Court. Driver v. Thompson, 4 Taunt. 294. (*a*) 3 Brown C. C. 213. (*b*) 1 P. Will. 264. 2 Vern. 639; also see the cases in the following references, 1 Vern. 41. 2 Vern. 604. 2 Atk. 384.

nerate *B*'s estate mortgaged as above; but that such mortgage should be postponed to the other debts of *A*, and that it should have precedency to legacies which were given by *A*'s will.

Whether the wife's right to exoneration is subject to the claims of the husband's other creditors.

Hence it appears, as it is now settled, that the wife's right to exoneration is similar to that of an *heir*, who is entitled to have his ancestor's descended estate exonerated out of the personal assets from a mortgage contracted by such ancestor; so that as the heir could not, neither can the wife have the benefit of their titles to exoneration, when the exertion of them would defeat any of the *bona fide* creditors of the deceased (*a*).

The rights of the wife and heir considered.

But since the heir claims his estate from his ancestor who contracted the debt, and the wife claims her estate by a paramount title, and not under her husband, and therefore not liable to any of his debts; attention to this distinction is necessary to comprehend the reasons for the decisions in those two cases, with reference to the different interests which the deceased had in the two estates, viz. the liability of the one to the payment of his debts, and the exemption of the other from the discharge of any of them. Thus in the case of the *heir*;—if the mortgagee were paid his debt out of the ancestor's personal estate, and that fund was insufficient to pay the other debts, the unsatisfied creditors might recover out of the real estate in mortgage what had been taken by the mortgagee from the personal funds, by being permitted to stand in the mortgagee's place, and to make use of his security; the real as well as the personal estates having been the property of the debtor, the deceased ancestor. But in the case of the *wife*;—as the estate in mortgage for the husband's debt was not his but her property, and therefore not liable to his debts, this circuity cannot take place; and accordingly *Lord Hardwicke*, in *Robinson* v. *Gee* (*b*), in allusion to this point, expressed himself thus: "It is a common

(*a*) 3 Brown C. C. 211. (*b*) 1 Ves. Sen. 252.

case for a wife to join in a mortgage of her inheritance for a debt of her husband: after his death, she is intitled to have her real estate exonerated out of his personal and *real* assets, the Court considering her estate only as a *surety* for his debt, and none of *his* creditors have a right to stand in the place of the mortgagee to come round on the wife's estate." Probably it was for want of this power, and in consequence of the rule that the equities of the wife and of the heir are in principle the same, that in the above case of *Tate* v. *Austen*, it was decided that the wife's right to exoneration should be postponed to the husband's other creditors; which was in effect placing her in the condition of the heir. But in the following particular, her right of exoneration as settled by the last case in giving her a preference to general legatees exceeds that of the heir, for against him *legatees* as well as creditors are permitted to stand in the mortgagee's place (*a*): this advantage given to the wife appears to be the consequence of the inability to subject her estate by circuity as above; the effect of which, although allowed to creditors, is not extended to volunteers as legatees (*b*).

(*a*) Bunb. 137. Lutkins v. Leigh, Forrest. 53.—Rider v. Wager, 2 P. Will. 329—335.

(*b*) The reports of the case of Tate v. Austen do not state the principle upon which it was decided, that the amount of the mortgage, which was admitted to be a debt due from the husband, was to be postponed to his other debts. The decision appears to have been sanctioned by Lord Thurlow in Clinton v. Hooper: according to the report in 1 Ves. Jun. 189, his Lordship speaking of the wife's right to exoneration, said that the cases obliged him to put it in the same way as between heir and executor; for this reason, that an assumpsit between husband and wife would not be raised more in equity than at law. If this reason were conclusive, it would be difficult to say why the wife should in any case be intitled to claim this exoneration. But, if on the other hand the law considers the wife when mortgaging her property for her husband's debt to stand in the situation of a surety, it seems to follow that she must be invested with the usual rights of a surety, and therefore that she must be intitled to the benefit of the securities as against

Wife's right to exoneration continues, although the original debt be discharged by the husband, if he borrow another sum on the same security.

If the debt were originally the husband's, and the mortgage of his wife's estate securing it were paid off by him, and he borrows another sum of money upon security of the same estate, then whether the wife does or does not join in the second mortgage, his assets will be liable to exonerate her estate; since, the original debt being the husband's, it ever afterwards continued to be so, for the change of securities made no alteration in that respect; and the husband cannot by any direction in his will ordering his personal estate to be applied in payment of all debts, except mortgage debts, exempt the application of that fund to exonerate his wife's estate.

---

her husband's estate, and to receive satisfaction of the debt according to its degree. This is the view of the question which has been taken in several cases. In Parteriche v. Powlet, 2 Atk. 384, Lord Hardwicke lays it down that the wife paying her husband's mortgage debt by a loan of money out of her separate estate, is equally intitled to stand in the place of a mortgagee as a stranger; and that if she joins with him in charging her estate, she is in like manner intitled to stand in the place of the mortgagee, and to be satisfied out of her husband's estate. The expressions of Lord Hardwicke in Robinson v. Gee, cited in the text, are to the same effect. He states that she is intitled to satisfaction out of the real and personal assets of the husband's, thus treating her as a specialty creditor: he adds that her estate is only a surety, and that the other creditors of the husband cannot stand in the place of the mortgagee against her, a right which they would of course have if they were intitled to a preference in the administration of the husband's assets. In Kinnoul v. Money, 3 Swan, 217, *n.* Lord Camden considers it in the same manner; the Court, as he expresses it, dissolving the marriage *quoad* the transaction. In the recent case of Aguilar v. Aguilar, 5 Mad. 414, the wife joined her husband in granting an annuity charged upon her separate estate, and also upon a fund to which the husband was intitled *jure mariti*. It was held that she was intitled to have the latter fund applied towards payment of the annuity, (in exoneration of her separate estate) not only as against her husband, but as against his assignee under the Insolvent Debtors' Act, and as against persons in whose favour he had subsequently charged it. See also Pitt v. Pitt, 1 Turn. Ch. Rep. 180.

Accordingly, in *Astley* v. *Tankerville* (*a*) the wife's estate being in strict settlement, with the ultimate limitation to her and her husband in fee, with a power for them to revoke the old and appoint new uses, they mortgaged the premises for five hundred years to secure 3000*l.*, with a reservation of the equity of redemption to the husband, or such other persons to whom the freehold and inheritance should belong. The mortgage having been paid off, the term was assigned by deed in trust for such uses as the husband should appoint; and in default, to attend the inheritance; but the wife was not a party to the deed. The husband afterwards borrowed 3000*l.* upon security of the estate, and by his appointment the term was assigned for the benefit of the mortgagee, and the husband covenanted for payment of the money. He then made his will, and ordered that his personal estate, not otherwise disposed of, should be applied in payment of his funeral expenses, debts, and legacies, except such debts as were secured upon and might affect any of his estates in *A.*, &c., whereof he was not seised in fee-simple (meaning the wife's estate in mortgage). *Lord Thurlow* was of opinion, that the 3000*l.* was the husband's debt, and that his assets should exonerate the wife's estate; his Lordship therefore dismissed the bill which was filed to subject her estate to the payment of the debt, but without costs.

No exoneration where the money is applied to pay the wife's debt, or one affecting her estate before marriage.

The debt affecting the wife's estate must be that of the husband, or her claim to exoneration will fail; so that if a debt were contracted by her before marriage, and she and her husband joined in a fine and mortgage of her estate to a person who advanced money to pay off such debt; or if a mortgage subsisted upon the estate at the time of the marriage, and she and her husband joined in a transfer of it to some other person,

(*a*) 3 Brown C. C. 545. 1 Cox, 82.

and the husband covenanted to pay the money; in none of these, or the like cases, will his assets be liable to exonerate the estate, because the debt affecting it never was his debt, the money never came to his hands, and his covenant will not have the effect, contrary to the fact, of making that the debt of the husband, which was not so originally (*a*).

Thus, land descended to the wife subject to a mortgage; the mortgage was assigned, and the husband covenanted to pay the money to the assignee. It was decided, that as the debt was not the husband's, his personal assets should not exonerate the wife's estate; and the covenant was considered as an *additional* security only for the satisfaction of the lender of the money (*b*).

Or where the money was paid to her, and remained under her separate control.

According to *Lord Thurlow*'s opinion, in *Clinton* v. *Hooper* (*c*), it would seem, that if the money borrowed upon the wife's estate were paid or transferred to her with her husband's privity, so that she might dispose of it as she pleased, and instead of spending she preserved it, and had the power of disposing of it by will as if she were unmarried; then, although the Court will not infer an equitable assumpsit, contrary to the tenor of the obligation subsisting between husband and wife, who cannot contract with each other without the intervention of trustees; yet, as she had the sole controul over the money, and it never was the husband's during her life, the principle that the debt was not the husband's would apply, and therefore would exempt his estate from exonerating the security affecting his wife's under the above circumstances; and that if, by a distinct transfer and independent transaction, without any relation to the original matter, she gave the

---

(*a*) As to the effect of the husband's covenant, see 9 Mod. 12. 20. Ambl. 173. 1 Bro. C. C. 454. 2 Bro. C. C. 57—101. 152. 14 Ves. 417.

(*b*) Bagot v. Oughton, 1 P. Will. 347. (*c*) 1 Ves. Jun. 188.

money to her husband, that circumstance would not probably reach back to the original contract, so as to make the husband the original debtor, and to ground the wife's right to exoneration upon the principle, that payment having been made to the wife was, in the common legal sense, payment to her husband.

If part of the money be her husband's debt, to that extent her right to exoneration attaches.

But suppose part of the sum borrowed on security of the wife's estate to be the debt of the husband, and the remainder of the money to be applied in payment of debts owing by the wife *dum sola*, or to which the estate was liable previously to the marriage; in that case it seems that the general rule is applicable, and that the wife will be a creditor upon her husband's estate for the proportion of the debt received by him.

But when the security can be connected with a contract for settling the wife's estate, there the wife will not be intitled to exoneration.

But if, from the nature and the circumstances of the transaction, it appears or can be inferred to have been the intention of the parties that the wife's estate should be solely liable to discharge the whole sum borrowed, as in the instance of the mortgage having relation to the settlement of the estate by the agreement of the parties upon the marriage (*a*); there, since an inference may be drawn that such agreement extended to the subsequent mortgage, and that it was stipulated that the sum to be borrowed should be charged upon and borne solely by the settled estate, such a case will form an exception to the general rule, and exempt the husband's estate from the wife's general equity.

(*a*) Or if such intention can be inferred from a settlement of the estate contained in the mortgage deed, or made at the same time. Thus in Lewis v. Nangle, Ambl. 150, Lord Hardwicke said, that there was no instance of considering the husband answerable to the wife's estate for the money borrowed, when a settlement was made at the same time with the mortgage either before or after the marriage. For the distinction between the cases in which the transaction is considered as a mere mortgage, and those where the deed is considered to furnish evidence of an intention to alter the relative rights of the husband and wife, see Innes v. Jackson, *post*.

According to this distinction, the apparent disagreement of the cases of *Lewis* v. *Nangle*, and *Lord Kinnoul* v. *Money*, may probably be reconciled.

The former case was to the following effect :—

Mrs. Nangle (*a*) was before her marriage with the defendant indebted to several persons, and intitled to the inheritance of lands charged with the payment of sums of money. She, before her marriage, entered into articles, by which the premises were to be settled to the husband for life *sans* waste, remainder to the wife for life, remainder to the issue of the marriage, with remainder to the wife in fee. The marriage took effect; and the husband being pressed for the payment of the wife's debts, and having also occasion for a further sum of money, he and his wife borrowed 1300*l.* of the wife's sister, and secured it by a mortgage of the wife's estate. He also covenanted for payment of the whole money, and executed a bond conditioned for the payment of it according to the provisoes in the mortgage. *Subject* to this *mortgage* the *lands* were *settled* to the husband for life, remainder to the wife for life, remainder to the issue of the marriage, remainder to the wife's sister (the mortgagee) in fee. *Mrs. Nangle* died without issue; and the plaintiff, the devisee of the wife's sister, filed his bill against the husband for payment of the mortgage money. But *Lord Hardwicke* dismissed the bill, so far as it sought to compel the husband to exonerate the estate, and directed him to keep down the interest during his life.

His Lordship considered this case an exception to the general rule; and it seems that, as the estate was settled *subject* to the mortgage, it was reasonable to infer an agreement between the parties; that the estate

---

(*a*) Ambl. 150. but better reported 2 P. Will. 664. in notes, ed. by Cox. 1 Cox, Rep. 240. See 1 Bligh. 122.

should be *settled cum onere*, especially as the ultimate limitation in fee was by the same settlement made in favour of the mortgagee.

The case of *Lord Kinnoul* v. *Money* was as follows:—

Miss Earl (*a*) had a real estate, which was itself subject to a certain extent, and the general estate of her father, subject to the amount of 2500*l.* Before her marriage it was mortgaged to *Wyat* for that sum, being her own debt, or, more properly, that of her ancestor. After the marriage, when it was settled in very strict settlement, with only a power after the limitations for life and in tail (which limitations in tail were gone by the death of the son while an infant) to charge by will, and to act upon it during coverture, as fully as any woman could receive such power by settlement, the husband had occasion to raise 3000*l.* upon the estate; that was done by fine, and not by virtue of her power; for then it would not have affected it in his life, nor indeed in hers: but that sum was afterwards raised for his benefit; and their mortgage was made for the *whole* sum, which was 7000*l.*, and 1000*l.* interest incurred, in all 8000*l.* This was expressed to be done by virtue of her power. *Lord Hardwicke* referred it to the master to see what was raised for the wife's debt, and what for the husband's use. In 1767, before the report, it came on for a re-hearing before *Lord Camden*, and it was insisted, that the reference was wrong; but, worse than that, that there ought to have been an immediate decree; and that the whole ought to have been charged upon the estate of the wife. But *Lord Camden* saw no reason to overturn that interlocutory decree; and,

---

(*a*) Stated in the words of Lord Thurlow, in 1 Ves. Jun. 186. See the note of this case in 3 Swan, 202, *n.* from which it appears that the mortgage for 2500*l.* was treated for before the marriage, but executed afterwards.

therefore, at his recommendation, the parties agreed that it should be confirmed, and the cause was to stand for further directions; and he confirmed the decree *in omnibus;* and particularly said, that the wife's estate was not to be subject to any part, except what was for her; and that *Lewis* v. *Nangle* turned upon different circumstances, *not* upon the general principle.

What these circumstances were, will appear from the observations which have been made upon that case. The case of *Lord Kinnoul* v. *Money* seems to be devested of all the particularities which converted the former into an exception to the general rule. Thus in *Kinnoul* v. *Money*, the husband's debt does not appear to have been in contemplation previously to the marriage, nor to have formed the subject of treaty in regard to the settlement of the estate; so that no inference could arise, or intendment be made of any stipulation or understanding among the parties, that the money, which it appears the husband *subsequently* wanted, should be exclusively borne by the wife's estate. This case also wants the circumstance, and consequently the inference deducible from it, of the ultimate limitation in fee of the settled estate being made in favour of the mortgagee.

Evidence is admissible to show whether the money raised was for the husband or his wife.

But the above determination of *Lord Hardwicke*, in *Lord Kinnoul* v. *Money*, and confirmed by *Lord Camden*, decided by inference this point—that if it do not appear from the deed to lead the uses of the fine, that the money borrowed was the debt of the wife, such fact may be proved *aliunde;* for if this evidence were not admissible, it is obvious that the reference to the master to inquire what was raised for the wife's debt, and what for the husband's, would have been erroneous.

But parol declarations of the wife of her agree-

But it would seem that evidence of parol declarations by the wife, that she had agreed to give the proceeds of the estate, or the money charged upon it, to her

husband, would be inadmissible to repel her equity to exoneration out of his estate, as I infer from the case of *Clinton* v. *Hooper* (*a*): and in *Tate* v. *Austen* (*b*), although it was there insisted that the money charged upon the wife's estate was a *gift* from her to him, it did not prevail.

ment to make a gift of the money to her husband are inadmissible.

But the wife may exclude herself from her right or claim upon her husband's assets, when she induces his executor to administer them in paying legacies, upon her professions that she did not intend to assert her title to exoneration out of her husband's estate.

The wife's equity to exoneration may be waived.

Accordingly, in the case of *Clinton* v. *Hooper*, so frequently referred to, the widow told her husband's executor, that she did not mean to claim her right of exoneration; and she desired him to proceed in paying the legacies. Notwithstanding all the legacies, except two small ones, had been discharged prior to this declaration, *Lord Thurlow* determined, that she had waived her equity; and he dismissed the bill which she had filed to have her estate exonerated out of her husband's assets.

III. In instances where the husband and wife have mortgaged her estate for the payment of his debts, it has occurred that the equity of redemption has not been reserved to the wife, but to her and her husband, or to the survivor of them; and it has been considered that such a reservation would in no case be permitted in equity, but that the husband would be in that Court a trustee for his wife, upon the principle, that, for her protection it was necessary, in order to effect an alteration of her interest in the equity of redemption in her own estate, there should be some expression in the recitals of the instrument that a new settlement of the property was intended; and it was not sufficient to

Effect upon the wife's right where the equity of redemption is not reserved to her.

(*a*) 1 Ves. Jun. 173. 3 Bro. C. C. 201, S. C. (*b*) 1 P. Will. 266.

collect such intention merely from the limitations in the deed, but, on the contrary, that something was required to appear upon the face of the instrument, which showed the wife to have understood what those limitations were; and this was *Lord Eldon*'s opinion, in the case of *Innes* v. *Jackson* (*a*), which has lately been reversed in the House of Lords (*b*). But when it is considered that the common law permitted the wife, as has been observed, to dispose of her real estate by fine as she pleased, and even to her husband, it seems but reasonable that when such a fine is levied, and the uses declared, they should not be controlled in equity, except when fraud or mistake form ingredients in the transaction. When, therefore, a reservation of the equity of redemption of the wife's estate upon a mortgage by her and her husband, other than to herself, will and will not be binding upon her, may, it is presumed, be resolved by attending to the two following propositions:

1. The mere reservation of equity of redemption to the husband will not change wife's interest.

1. When the mortgage deed contains no limitations of the estate beyond the security, and reserves the equity of redemption to the husband alone, in that case the wife's original sole interest will be preserved to her, upon the principle, that she being the sole owner of the estate, the *mere form* of the reservation of the equity of redemption is insufficient of itself to alter or change the prior title to the property, for the circumstance of the reservation having been made otherwise than to the owner of the estate (the wife in the present instance), is presumed by law to have originated either in the *inaccuracy* of the language of the clause, or in the *mistake* of the person who prepared or engrossed the deed; neither of which circumstances is allowed to prejudice the person having the prior title:—But,

---

(*a*) 16 Ves. 356. (*b*) 1 Bligh. 104.

2. When the mortgage deed contains a settlement of the wife's estate, and the mortgage, or the form of reservation of the equity of redemption, has nothing to do with the subsequent limitations of the property, but is perfectly distinct from them, as where the mortgage is for a term of years, and the limitations apply to the inheritance, in that case these limitations, through the medium of the wife's fine, will take effect; and the persons intitled to redeem will be, not the wife under her prior title, but the persons interested in the estate under the uses or limitations contained in the mortgage deed.

2. Contra when the limitations are distinct from the transaction of the mortgage.

I shall endeavour to illustrate these two propositions from the cases which have been determined.

1. The authorities to be arranged under the first proposition are as follow:—

The first case that decided this species of resulting trust in equity in favour of the wife, upon transactions of this nature, was *Broad* v. *Broad* (*a*), determined in the reign of Charles the second.

There the husband settled houses in *Bread-street*, producing 350*l.* a year, to the use of himself for life, remainder to his wife for life for her jointure, with remainder over. In the year 1666 the houses were destroyed by fire, and the husband being unable to rebuild them without a loan of money, induced his wife to join with him in a fine *sur concessit* for a long term of years to secure the money to be borrowed, and he agreed with her that the fine should not operate to her prejudice, but that she should redeem, paying the interest of the money. 600*l.* were borrowed of *B*, and a fine levied to him by husband and wife for ninety-nine years. *B* redemised the tofts of the burnt houses to the husband for ninety-eight years, at a yearly rent of

(*a*) 2 Chan. Ca. 98, 161.

36*l.*, and to repay the 600*l.* at a time, &c. (the form in which such kind of mortgages was then made). The houses were rebuilt, and the husband settled them with other lands on himself in tail, remainder in tail to his brother, *C*, charged with portions for his daughters, and died in the year 1674, having appointed *C* his executor: his personal estate being insufficient to pay all his debts, *C*, as his surety, was responsible to the amount of 1600*l.*, took possession of the houses, discharged the 1600*l.*, and paid the interest of the mortgage until the year 1681, when the widow filed a bill to redeem the mortgage, &c. In resistance of this claim, it was contended that by the redemise of the houses *to* the husband, they were assets at law to pay his debts; and the agreement was resisted on the ground of its resting in parol, of which the defendant had no notice before the bill was filed. In reply, it was insisted for the widow, that the equity of redemption properly belonged to her, and that her husband could not discharge it by any subsequent act. The then Chancellor decided that she was intitled to redeem the houses upon paying a third part of the principal debt, but none of the profits received by the defendant prior to the commencement of the suit, he having had no notice of the agreement before that time (his Lordship proceeding entirely upon the agreement), and *C* was to pay the remaining two-thirds of the debt, and the widow's personal representative was to be reimbursed if she paid more than her one-third, and died before it was again received by her. The case having been afterwards reviewed by *Lord Keeper North*, he confirmed the decree, and gave the following reason: "that when the wife joined in the fine *sur concessit* of her jointure in order to a mortgage security, it was not an absolute departure with her interest; but there resulted a trust for her, when the security or mortgage was paid, to have her estate again, as if it had been a

mortgage upon condition, and the money had been paid at the day."

The above case has been particularly stated, as it may be considered the first that established the principle upon which the first proposition is founded, and which principle has been considered in all subsequent cases. The last case determined upon that principle was *Ruscombe* v. *Hare* (*a*), and which was to the following effect:—

A, in the year 1749, mortgaged his estate to *B* for 800*l*., at 4*l*. 10*s*. per cent. interest, and covenanted to levy a fine, the uses of which were to enure to the mortgagee in fee, subject to redemption. The fine was levied, and in the year 1762 *A* charged the estate with a further sum of 450*l*., borrowed of *B*, at 4*l*. 5*s*. per cent. interest. *A* devised all his lands to his wife, *C*, and died in the year 1764. *C* married *D*, and they, in the year 1766, consolidated the two mortgages, agreed to pay interest at 5 per cent. on the whole sum, and executed a new security to *B*, discharged of the former proviso for redemption, but subject to redemption by *D*, in which event the re-conveyance was to be made to him in fee: *B* and his wife declared that all prior fines, &c. and a fine covenanted to be levied by them (which was afterwards levied), should enure to the use of the mortgagee in fee, subject to the condition of redemption. The question was, whether the reservation of the equity of redemption to the husband by the deed, in 1766, intitled him to the estate; upon the solution of which question depended the title of a purchaser from him of part of the premises. And it was determined against the purchaser, upon the principle that the mere proviso for redemption to the husband should not alter the wife's prior right; con-

(*a*) 6 Dow's Parl. Ca. 1.

sequently the purchaser's title, as claiming under the husband, was defective.

It is observable, that in the last case the only alteration attempted to be made in the wife's interest in her estate was in the *form* of reserving the equity of redemption, which, for the reasons before mentioned, is not permitted to devest her of her title to redeem, which was incident to her prior right of ownership. But—

2. If the form of the proviso of the equity of redemption in the last case had nothing to do with the limitation of the estate, it is presumed, upon the principle stated in the second proposition, that the decision would have been the reverse of that which was pronounced. The cases upon that subject are as follow :—

In *Rowell* v. *Walley* (*a*) *A* and wife joined in a mortgage of lands which had been settled upon her for a jointure by her first husband. In the mortgage deed *A* covenanted to levy a fine for further assurance, and it was declared that if he and wife, or either of them, or their heirs, executors, &c. should discharge the debt, the fine should enure to husband and wife, and the survivor of them, remainder to the right heirs of the husband. (This declaration, the reader will observe, is an instance of a settlement of the estate distinct from the proviso for redemption, and was a declaration of what should become of the estate after the mortgage was satisfied). The fine was levied, and *A* died. The question was, whether his widow was intitled to redeem in respect of the estate reserved to her by the mortgage deed and fine, or in respect of a resulting trust under her prior title; and the Court showed, by its decree, that her title to redeem was as tenant for life under the deed and fine, and that the heir of the *second* husband would be intitled to the estate after her death.

(*a*) 1 Ch. Rep. 116. See also Lewis v. Nangle, *supra*, p. 150.

The principle of the last determination seems to have been alluded to in the case of the *Earl* and *Countess* of *Huntingdon*, reported in *Vernon* (*a*); but the last and solemn decision upon the subject was made by the House of Lords in the case of *Jackson* v. *Innes* (*b*), upon appeal from the decree of *Lord Eldon* (*c*).

There, by a settlement in 1743, made previously to the marriage of *A* with his wife *B*, *B*'s estate, consisting of two farms *F* and *G*, was settled to the use of *A* for life, remainder to *B* for life, remainder to the first and other sons of the marriage in tail male, &c. with the ultimate remainder to *B* in fee. A power was reserved to *A* and *B* during their joint lives, to revoke, as therein mentioned, the old, and to limit new uses of that estate. There were issue of the marriage, but they died before their parents. In November 1745, *A* borrowed of *C* 200*l*., to secure which *A* and *B* demised the lands for 1000 years to *C*, *reserving the equity of redemption to themselves or either of them, their or either of their heirs, executors, administrators, or assigns.* The effect of which transaction would be an execution of the settlement power in favour of the mortgagee to the extent of his debt, by a revocation of the old uses, so far as was necessary for that purpose, and no farther; so that according to the first proposition, the persons who would have been intitled to redeem the estate, if there had been nothing more in the case, would not have been the heirs or personal representatives of *A* and *B*, but the persons who were interested under the settlement. But in December 1745 and January 1746, *A* borrowed of *C* an additional sum of 400*l*., which by two deeds of those dates was charged upon the estate for the residue of the term, and a proviso for redemption, similar to that contained in the original mortgage, was reserved, after discharging the

(*a*) Vol. II. p. 437, and 2 Bro. Parl. Ca. 1, *oct. ed.*
(*b*) 1 Bligh. 104. (*c*) 16 Ves. 356.

power to redeem reserved in such original security; and it was declared that the term should be void on payment of both sums with interest. *A* and *B* covenanted to levy a fine (which was afterwards done), the uses of which were declared by the mortgage deed to enure to *C* during the term, subject to the proviso for redemption, and "*after the expiration or determination of such term to the use of* A *and* B *for their lives, and during the life of the survivor, and after both their deaths to the use of the heirs of their bodies, and for default of such issue to the use of the right heirs of the survivor of* A *and* B." The mortgage was discharged by *A*, who took an assignment of the term to himself. And the question was, whether the persons claiming under the wife were intitled to redeem the mortgage, which had been discharged by the husband, and to hold the estate in opposition to the limitations contained in the latter mortgage deeds; or whether the persons deriving title under the husband (who upon the events which happened had acquired the inheritance of the estate under the fine and the limitations contained in those instruments) were intitled to the estate? The determination of which claims depended upon this prior question, viz. whether under all the circumstances of the case, a trust of the inheritance in the whole resulted to the wife after payment of the mortgage debt, according to the first proposition before stated; or whether such trust was repelled by the manner in which the estate was limited in the mortgage deeds after satisfaction of the debt, according to the second proposition before also stated? *Lord Eldon* decided in the Court below in favour of the claimants under the wife, upon the principle, that the property being the wife's and the transaction a mortgage, the right of the wife to the estate subject to the mortgage could not be altered, except it were apparent on the face of the deed, from express declaration, or something equivalent to it, that more was intended to be done than

merely to make a mortgage. His Lordship must, therefore, have been of opinion, that the limitations of the estate, whatever they might be, could not afford that manifest intention equivalent to declaration, that the estate after satisfaction of the debt should go in any other course than to the wife and her family; for *if his* Lordship had entertained a contrary opinion, the present seems to be a case in which he would have probably decreed against the claimants under the wife. From the above decree the persons deriving title under the husband appealed with success, and it is upon the authorities before stated, and *Lord Redesdale's* elaborate argument in the last case, that the two propositions on this subject, and before stated, are founded (*a*).

(*a*) See the form of a mortgage of the wife's estate in Append. No. 3, Vol. ii. See also the form of a further charge upon the same estate, in Append. No. 4.

CHAPTER V.

THE HUSBAND'S INTEREST IN AND POWER OVER HIS WIFE'S PERSONAL ESTATE.

In treating of these subjects, I shall proceed to consider,—

I. *The interest which the husband has in the personal estate and real chattels which belonged to his wife before marriage; and her power of disposing of them in contemplation of the marriage, without her husband's privity.*

II. *The husband's interest in and power over the personal estate and real chattels which are in his wife's* POSSESSION *at the time of the marriage, and such as she becomes* possessed *of during its continuance; and the effect of the wife's* WILL *made with his consent, and by his authority.*

III. *The interest of the husband in and his power over the personal estate and real chattels which his wife is possessed of or intitled to as* executrix *or* administratrix; *and his liabilities in respect of them.—And,*

IV. *The husband's interest in and power over such of his wife's personal estate and real chattels as are not* in possession, *but are* immediately recoverable *by action at law or suit in equity.*

I. The interest which the husband has in the personal estate and real chattels (*a*) which belonged to his wife before marriage, and her power of disposing of

---

(*a*) The observations in this section apply to settlements of the wife's real estates made previously to her marriage, as well as to settlements of her personal estate and chattels real.

them in contemplation of the marriage without her husband's privity.

A woman not permitted to dispose of her property in fraud of a marriage then in treaty.

This interest of the husband is founded upon the good faith which ought to subsist inviolable in relation to so solemn a contract as that of marriage. In strictness the husband can have no right to any of his wife's property previously to the solemnization of the marriage. Before marriage, therefore, the wife is at liberty to settle or dispose of her fortune as she pleases, provided it be done with no improper motive, nor to deceive the person who is then addressing her with a view to their union. But deception will be inferred if, after the commencement of the treaty for marriage, the wife should attempt to make any disposition of her property without her intended husband's knowledge or concurrence. The injury he would sustain, if such a transaction were to be sanctioned, is obvious; for since the wife's apparent fortune in addition to his own may be a weighty consideration and inducement for entering into the contract, the happiness of both might be endangered, if, after the treaty began under such calculations and persuasions, the wife should be enabled, prior to the marriage, to disappoint them by disposing of or abridging her interest in the property that belonged to her. It is presumed, therefore, that without the consent of the intended husband the law will not permit any disposition of the wife's fortune to be made before the marriage then in contemplation; and that under no circumstances after a treaty for a marriage has commenced, will any such voluntary disposition of her property be binding upon her subsequent husband. In the absence of other instances of fraud, the time when the disposition or settlement was made must decide its validity, and attention to this circumstance will, as it is presumed, reconcile the principal cases. In the *Countess* of *Strathmore* v. *Bowes* (*a*),

(*a*) 1 Ves. Jun. 28.

Lord Thurlow said, " A conveyance by a wife, whatsoever may be the circumstances, and even a moment before the marriage, is *prima facie* good, and becomes bad only upon the imputation of fraud. If a woman, *during* the *course* of *a treaty* of marriage with her, make, without notice to the intended husband, a conveyance of any part of her property, I should set it aside though good *primâ facie*, because affected with *that fraud*."

In *Howard* and *Hooker* (*a*), a widow, prior to her second marriage, made a settlement of her estate without the privity of her second husband; and he having married her in confidence of her having that estate, the settlement was set aside.

That settlement was made in contemplation of the second marriage, and came within the above rule; there were also special circumstances of fraud upon the husband which were considered by the Court in pronouncing its judgment.

In *Carleton* v. The *Earl* of *Dorset* (*b*), *Lady Dayrill*, before her marriage and without her husband's knowledge, conveyed her estate to trustees, to permit such persons to receive the rents as she, whether sole or married, should appoint. It was decided, that the settlement could not be supported against the husband. Besides the probability in the last case of the settlement being made during the time of the husband's addresses, it is stated in *Mr. Cox*'s report, that the wife had assured her intended husband that he should enjoy her estate (*c*). Here then was a plain deception, which alone would vitiate the transaction; and a similar deception appears to have been practised in the case of *Cotton* v. *King* (*d*).

(*a*) 2 Ch. Rep. 81. 1 Eq. Ca. Abr. 59. S. C. (*b*) 2 Vern. 17. See also Poulson v. Wellington, 1 P. Will. 535, Lance v. Norman, 2 Ch. Rep. 79. (*c*) 2 Cox, 33. (*d*) 2 P. Will. 359, 674. Mos. 259.

Whether a settlement upon the children of a former marriage, if made during treaty for a second, and without second husband's privity, is valid.

But it has been considered, that if at *any time* before marriage solemnized, the wife settle all or part of her property upon her *children* by a former husband, such settlement will bind the second husband notwithstanding he were ignorant of it, until after the ceremony took place; but this, although countenanced probably by an old case next stated, seems to be contrary to principle, and to the rights of the husband, which, for his protection, have relation to the commencement of the treaty: and when it is remembered, that from such period, no clandestine transaction of the wife to the prejudice of her subsequent husband is allowed to be effectual against him; it would seem that a settlement made upon those children by the wife at the time when she contemplated marriage with her second husband, could not be supported against him, supposing him to have been ignorant of it until after his marriage.

The case last alluded to, and mentioned as a probable authority against this doctrine was, as it is reported, to the following effect;—

A widow, before she married again, assigned the greatest part of her estate as a provision for her children by her first husband. It was insisted for the second husband, that the deed, having been made a little before the marriage, was fraudulent. But the Court was of a contrary opinion, and therefore supported it, deeming it a conscientious thing in the wife, to provide for such children before she placed herself under the power of a second husband (*a*).

There certainly could be no objection to the objects of the settlement; the fault is the fraud committed by it upon the second husband. If it be inferred from the statement in the last case that the deed was made a day or two, or a week before the second marriage; then the decision and *Lord Thurlow*'s declaration in

---

(*a*) Hunt v. Matthews, 1 Vern. 408.

Strathmore v. *Bowes* are at variance (*a*). But if it may be presumed that the transaction took place before such marriage was in contemplation (and the statement is general in the report), then this decision will be consistent with the distinction which has been made, and from which it is a necessary consequence,—

Contra if the settlement were made before the commencement of any such treaty.

That when there is no possibility of any deception upon the second husband, as where a woman being desirous to make provision for her children by a former husband does so shortly after the death of the first, and *prior* to any treaty of marriage with a second husband, with a view to place it out of her power upon a future

---

(*a*) "The question in all the cases," observes Lord Thurlow, "is, whether the evidence is sufficient to raise fraud." - 1 Ves. Jun. 28. Mr. Justice Buller in the same case said, "Fraud consists in falsely holding out that a woman has an estate unfettered, and that the husband will be of course intitled to it. No case has yet established that all conveyances by a wife before marriage are void, merely because not communicated to the husband." 2 Bro. C.C. 350. It may be inferred, that though a conveyance made during the treaty of marriage is *prima facie* fraudulent, yet the case must be decided upon a view of all the circumstances of the transaction.

In King v. Cotton, 2 P. Will. 674, the reasonable nature of the settlement, as being a provision for children of a former marriage, was one of the circumstances on which the decision in its favour was founded: in that case there was, however, also the material fact of the settlement having been made before the commencement of the treaty of marriage. See also Newstead v. Searles, 1 Atk. 265.

In Blanchet v. Foster, 2 Ves. sen. 264, a woman on the eve of marriage gave a bond for valuable consideration, and she, and the obligee, at her request, concealed it from the intended husband. It was held good against him.

In Thomas v. Williams, Mos. 177, a woman during a treaty of marriage, without the knowledge of her intended husband, voluntarily released a legacy due to her. The transaction was sustained against the husband; the Lord Chancellor remarking that he did not appear ever to have inquired after this legacy. See De Manneville v. Crompton, 1 Ves. and B. 354.

The concurrence of the intended husband in the settlement, though he be a minor, precludes all objection on this ground. See Slocombe v. Glubb, 2 Bro. C. C. 545.

marriage, so to settle her property as may be unjust or prejudicial to them, in such a case, since the consideration is meritorious, and there is no pretence for imputing to the transaction any species of fraud, the settlement so made cannot be impeached by any subsequent husband.

In the case of the *Countess* of *Strathmore* v. *Bowes* (*a*), (before referred to), *Lady Strathmore* upon the death of her first husband became entitled to considerable property under her father's will. She in the year 1777, being about to marry a person named *Grey*, conveyed, with *his consent* and for the purpose of providing for her children, all her real and personal property to trustees for her sole and separate use, notwithstanding any future coverture. Having altered her intention in regard to *Mr. Grey*, she a few days after the execution of the settlement married the defendant *Bowes*, who insisted in a cross bill filed by him in the cause, that he not having had notice of the settlement it was fraudulent and in derogation of his marital rights. But the deed was established against him; because there was no fraud practised upon him, he not having been in contemplation of any of the parties at the time when the settlement was executed. *Lord Thurlow* observed in affirming *Mr. J. Buller's* decree, that the law conveyed the marital rights to the husband, because it charged him with all the burthens which were the consideration he paid for them, so that they were rights, upon which fraud might be committed; and a rule of law arose out of them that the husband should not be cheated on account of his consideration: that the question which arose out of all the cases was, whether the evidence was sufficient to raise fraud; and that even if there had been a fraud upon *Grey*, his Lordship would not have permitted *Bowes* to complain of it.

(*a*) 2 Bro. C. C. 345, and 1 Ves. Jun. 22, S. C.

In *Ball* v. *Montgomery* (*a*) the last case was referred to by *Lord Loughborough*, who said, that if a woman previously to marriage conveyed her property without the privity of her intended husband, *it would be fraud;* that *Strathmore* v. *Bowes* went upon this, that the deed was honest and proper, being made in contemplation of a marriage with *another* person (*Grey*) and with his *consent* (*b*).

II. It being proposed in this section to treat of the husband's interest in and power over the personal estate and real chattles of his wife *in possession* at the marriage, and such as she becomes possessed of during its continuance, as also of her will made of her personalty, with her husband's consent; I shall consider the subjects of the section under the following subdivisions:—

1. The husband's interest in and power over his wife's personal estate in possession, and the effect of her will made as before mentioned.

2. His interest in his wife's real chattels, and in the rents due at his death when she survives him, and his liability to the charges affecting such chattels.

3. His power over his wife's real chattels so as to bind her surviving him; viz.—

By his alienation.
By surrender in law.
By his recovery of them in actions.
By their being awarded to him upon his submission to arbitration.
By his forfeiture of them—and
By their being taken in execution for his debts.

1. As to the husband's interest in and power over

(*a*) 2 Ves. Jun. 191—194. 4 Bro. C. C. 339, S. C.

(*b*) With respect to the interest which the husband may acquire in his wife's *choses* in action as a purchaser under a settlement made prior to, and in contemplation of his marriage, the reader will find it considered in Chap. 8.

his wife's personal estate in possession; and the will of her personalty made by his authority.

Of what personal estate marriage is a gift to the husband.

Marriage is an absolute gift to the husband of all the goods, personal chattels and estate, which the wife was actually and beneficially possessed of at that time in her own right, and of such other goods and personal chattels as come to her during the marriage (*a*). He may therefore dispose of them by his will, which will be effectual whether he survive her or not.

[And the marriage also vests in the husband chattels personal of the wife, which at the time of the marriage were in the possession of a third person. And, therefore, he may bring detinue or replevin for them without joining his wife in the action (*b*). So he may bring trover for them in his own name, if the conversion be subsequent to the marriage (*c*), because this supposes the property in the wife, which by the marriage is transferred to him, and therefore the conversion is a tort to him alone. And though the husband and wife may in this case join in the action, yet they cannot allege the conversion to be to the damage of both, the property being in the husband alone (*d*). If the conversion be laid before the marriage, it disaffirms the property of the wife at that time, and the husband and wife must join (*e*), as in other cases of a right of action which arose to the wife *dum sola*.]

The nature of the wife's will made with the consent of her husband.

He may also empower her to make a will to dispose of her personal estate, the nature and effect of which we shall now consider. The principle upon which this power of the wife is founded is this; that her husband may waive the interest which the law secures to him in

---

(*a*) Co. Litt. 300. (*b*) Bull. N. P. 50—53. Powes v. Marshall, 1 Sid. 172. See 1 Ventr. 261. Bacon's Abr. vol. i. p. 501, Bourn v. Mattaire. Selw. N. P. 280. (*c*) Powes v. Marshall, *ub. sup.* Blackborne v. Graves, 2 Lev. 107. See 2 Saund. 47, *i.* (*d*) Nelthorp v. Anderson, 1 Salk. 114. (*e*) Com. Dig. Baron and Feme, V.

her property by disabling her from disposing of it during the marriage.

[In order to establish the will, a general assent that the wife may make a will is not sufficient: it should be shown that he has consented to the particular will which she has made (*a*), and his consent should be given when it is proved (*b*). He may therefore revoke his consent at any time during his wife's life, or after her death, before probate (*c*). But his consent may be implied from circumstances, and if after her death he acts upon the will, or once agrees to it, he is not it seems at liberty to retract his assent and oppose the probate. And when the will is made in pursuance of an express agreement or consent, it is said that a little proof will be sufficient to make out the continuance of that consent after her death (*d*).]

Only available if he be the survivor.

The husband's consent to the will intitles the wife's executor to claim such articles of her personal estate, which would have been her husband's, *as her administrator*. It appears, then, that this consent is *personal* to the husband. It is no more than a waiver of his rights as his wife's administrator. It, therefore, can only give validity to the instrument in the event of his being the survivor. Hence it follows, that if he die before his wife, the will is void against her next of kin (*e*); and

---

(*a*) King v. Bettesworth, 2 Strange, 891. (*b*) Henley v. Phillips, 2 Atk. 49. (*c*) Swinburne on Wills, part ii. sec. 9, pl. 10. 4 Burn. Eccl. Law, 52. Anon. 1 Mod. 211. (*d*) Brook v. Turner, 2 Mod. 170. When the will is made in pursuance of an agreement before marriage, or of an agreement made after marriage, for consideration, it falls under the same rules as a will made by virtue of a power, as to which see *post*, vol. ii. chap. 19, sec. 3.

Effect of the wife's will, made during coverture, when she survives.

(*e*) By the husband's death the wife's will becomes void, so far as it derived its effect from his consent, and it therefore does not pass the right to property bequeathed to her during the coverture. 15 Ves. 156. But it is still good, so far as she was empowered to make it, without his consent; and it therefore passes the right of representation to a person to whom she was executrix. Scammele v. Wilkinson, 2 East, 552. And it will still be valid as an

she will be considered as having died intestate, if, after her husband's death, she make no disposition of her property.

After these preliminary observations, we will suppose the case of a married woman being appointed executrix and residuary legatee of *B*; and that she, having *choses in action* of her own, survived her husband; and that he by his will, made prior to his wife's will, after mentioned, bequeathed to her his residuary personal estate for her *sole* use, with a power by will to dispose of it, and appointed her executrix; and further, that after his death, she acquired personal property. Let us presume that she made a will during the marriage, with her husband's *consent* (and which he subscribed), bequeathing all her property of every kind, to which she might be intitled at her death, and over which she might have a disposing power, whether as such executrix and residuary legatee of *B*, and of her husband as above, or otherwise, and appointed executors. Two questions may be asked: First, what effect this will had upon the different descriptions of property before mentioned? and secondly, what administrations ought to be granted by the Ecclesiastical Court? From what has been said, and what will appear in the next section concerning the will of a *feme executrix*, and from what may be collected from the cases of *Scammell* v. *Wilkinson* (*a*), and *Stevens* v. *Bagwell* (*b*), the following answers may be given, viz. that independently of the husband's consent, the wife's will passed, by right of representation,

---

execution of a power, or as a disposition of property belonging to her during the coverture as separate estate. See Dingwall v. Askew, 1 Cox, 427. Doe v. Weller, 7 T. R. 478. Tappenden v. Walsh, 1 Phill. 352, and *post*, chap. 15, sec. 1; chap. 19, sec. 3. If she acquires other property after her husband's death, it does not pass by the previous will; for a different reason, viz. that at the time of making it, she had no testamentary power over such property. Swinb. part 2, sec. 9, pl. 5. 2 East, 556.

(*a*) 2 East, 552—556. (*b*) 15 Ves. 139.

to her executors, the outstanding personal estate of *B*, whose executrix she was;—that it had no operation upon her own personal estate, nor upon that which she acquired after her husband's death, nor upon the *beneficial* interest which she took as the residuary legatee of *B*. But that it did operate upon her husband's residuary personal estate, bequeathed by him to her, under the power given by his will for her to dispose of it, by her testament made either in his life-time or afterwards (*a*). And it is presumed, that upon the same principle by which the right of representation to *B* was transmitted by the wife's will to her executors, the right of representation to her husband was transmitted by it to them; for her will having been made with the assent of her husband, and a power given to her by his testament to make the will, and dispose by it of his residuary personal estate, and he having also appointed her his executrix, and consequently his sole legal personal representative, and since the appointment of an executor is essential to a perfect will, it is conceived that the husband's power to his wife to dispose by will of his residuary personal estate, included the power of her appointing an executor to perform the trusts of it; and that as such executor would represent the wife, he must also be the representative of the husband, whose representative the wife was by his own appointment. But this question was not alluded to in either of the cases last referred to, except that *Sir William Grant*, observed in *Stevens* v. *Bagwell* (*b*), that the Ecclesiastical Court limited the probate to the interest which the wife took under that will, and that no notice was taken of her nomination of executors.

With respect to the administration to be granted by the Ecclesiastical Court in such a complex case, it appears that a limited probate or administration *cum*

(*a*) 15 Ves. 154. (*b*) Ibid.

scriptis annexis quodd the effects of the wife's husband and of *B*, may be granted to her executors; but no probate or administration of her own *choses in action* not reduced into possession during the marriage, nor of her other property acquired after her husband's death, ought to be granted to them; for these not passing by her will, the administration of them belongs to her next of kin, and not to her executors; her executors therefore have no right to intermeddle with them. Hence appears the impropriety there would be, if the Ecclesiastical Court were to grant to the wife's executors an unlimited probate in such a case; for they would be enabled to recover property by it, which ought not to be administered under any of the wills, but by her administrator only; so that if a suit were instituted by her executors in the Ecclesiastical Court to obtain a *general* probate, the Court of *King's Bench* would grant a prohibition (*a*).

Nature of husband's interest in wife's terms for years.

2. To chattels real, of which the wife is or may be possessed during marriage, the law gives to the husband a qualified title only, *i. e.* an interest in his wife's right, with a power of alienation during the coverture. If, therefore, he dispose of his wife's terms for years, by a complete act in his lifetime, her right by survivorship will be defeated, as it will afterwards appear (*b*); but if he do not alien them, and he survive her, the law gives them to him, not as representing his wife, but as a marital right: no administration, therefore, is necessary to be taken out by him to her (*c*). If, however, the wife be the survivor, and the terms remain in *statu quo*, she, and not her husband's next of kin, will be intitled to them. Hence it follows, that he cannot dispose of them by his will against her surviving him;

His alienation defeats her title by survivorship.

If he survive he is intitled to them without administration.

If she survive, and no alienation made, she is intitled to them.

(*a*) 2 East, 552. (*b*) See the form of an assignment of the wife's term for years, in Append. No. 5, vol. ii. (*c*) 1 Roll. Abr. 345, pl. 40. Dyer, 251. Co. Litt. 46 *b*. 351 *a*. 2 Eq. Ca. Abr. 138, pl. 4. Doe dem. Roberts v. Polgrean, 1 H. Bl. 535.

for, as that does not take effect till *after* his death, the law takes precedence, and vests the terms in the wife immediately upon his decease; but if he happen to be the survivor, then his testamentary disposition will be good (*a*).

Upon similar principles, if there be two single women joint tenants of a lease for years, and one of them marries and dies, the term will survive to the other joint tenant; for, although chattels real are given to the husband if he outlive his wife, yet the survivorship between the joint tenants was the elder title, which was not severed by the husband during the coverture, marriage itself not having that effect (*b*); this, therefore, is of necessity an exception to the general rule.

Rents payable in respect of wife's terms for years; when she, as the survivor, or the executors of her husband, will be intitled to them, and the arrears due at his death.

In regard to the right of the husband's executors or his surviving wife to rents reserved upon under-leases of her chattels real, and to the arrears of rents due at the husband's death, there is a difference of opinion in the books, which may probably be reconciled by attending to the manner in which the rents were reserved.

Accordingly, if the husband *alone* grant an under-lease of his wife's term of years reserving a rent, that would be a good demise, and bind the wife so long as the sub-demise continued; the husband's executors, therefore, would, as it is presumed, be entitled not only to the subsequent accruing rents, but to the arrears due at his death (*c*).

And it would seem that the principle of the last case would entitle the executors, to the exclusion of the surviving wife, to subsequent rents, and all arrears at the husband's death, although the wife was a party to the under-lease, provided the rent were reserved to the husband only; because the effect of the sub-demise and reservation was an absolute disposition *pro tanto* of the

---

(*a*) Co. Litt. 351. (*b*) Co. Litt. 185 *b*. (*c*) 1 Roll. Abr. 344, 345. Co. Litt. 46 *b*. 2 Lev. 100. 3 Keb. 300. For in this case the wife claims by title paramount the lessor.

wife's original term, which she could not avoid, and the rent was the sole and absolute property of the husband.

But if, in the last case, the rent had been reserved by the husband to himself and wife, then, as their interests in the term granted and the rent reserved were joint and entire, it is conceived that the wife, upon surviving her husband, would be entitled to the future rents, and that she would be equally entitled to the arrears of rent at her husband's death; because they remaining in action, and being due in respect of the joint interest of the husband and wife in the term, would, with their principal, the term, survive to the wife (*a*).

Husband's title by survivorship is subject to all claims upon the terms.

With respect to the husband's liability to charges affecting his wife's terms for years, when he succeeds to them upon surviving her, the law may be considered to be thus settled:—

That when the husband survives his wife, and upon that event becomes intitled to her terms for years, he succeeds to them subject to all the charges and equities with which they were affected in her possession; so that, if the wife before marriage subjected them to an annuity or other incumbrance, and her husband, either after her marriage or after her death, renewed the leases, or surrendered the old and took new leases, the incumbrances in equity will attach upon such new leases, and the creditors will not be bound to contribute towards fines or expenses incurred in consequence of these transactions.

Thus, in *Moody* v. *Matthews* (*b*), *Mary Price*, being possessed of a lease of tithes for twenty-one years, granted to *Moody* an annuity for life out of them, in consideration of 300*l.*; and she covenanted for payment and further assurance. After this, she *surrendered*

(*a*) 4 Vin. Abr. (*D, a*) 117. (*b*) 7 Ves. Jun. 174.

the lease and took a new one for a further term of seven years, which she mortgaged to *Ruddock* for 300*l.*; and then she married the defendant *Matthews*, and died. Her husband administered to her, paid off the mortgage, and discharged the annuity until the year 1798, when he surrendered the lease, and took a new one in his own name for a further term of seven years; which surrender and renewal he afterwards twice repeated, and at each of those times he paid a fine out of his own money, together with the other expenses. And *Sir William Grant* determined upon the authority of *Maxwell* v. *Ashe*, stated by him, and the principles which he had mentioned, that the annuity was a charge upon the renewed lease, and that the arrears must be satisfied, and the annuity continue to be paid out of the profits of that lease. In answer to the points made by the husband, that he was not bound to pay the annuity beyond the term which the lease had to run when he acquired it in right of his wife, or, at least, that the annuitant was bound to contribute to the expenses of the renewals, his *Honour* said,—that the wife during her life was bound to preserve the lease for the annuitant; that the husband taking by *marital* right was not esteemed a purchaser for valuable consideration, and that he stood precisely in the place of his wife; so that the annuitant, as against the wife, being interested in the then lease, and all subsequent renewals during his life, he was equally interested in regard to the husband. But that the husband's *obligation* to renew was not the same as that of his wife, since, *after* the marriage, he was not bound by her *personal* covenants; yet that when the lease was renewed, the annuitant's equity attached upon it, since the renewed lease was considered in equity the same lease. And with respect to the contribution claimed by the husband, the Court said, that the annuitant was not liable to pay any proportion of the fines; for that would be to make him

Husband's marital rights do not make him a purchaser for valuable consideration.

Not bound by his wife's *personal* covenants.

pay the consideration twice; and reference was then made to the case of *Maxwell* v. *Ashe* (*a*).

Alienation by husband of wife's terms.

3. As to the husband's power over his wife's chattels real to bind her surviving him, it has been observed, that the law enables him to defeat his wife's interest by survivorship, by an absolute disposition of the whole term. In proof of this:—

Husband and wife being joint tenants for a term of sixty years, he alone demised the lands for seventy years, *to commence immediately after his death.* His wife survived him; and although it was urged that the lease was void, since it was not to commence till after his death, and that as he died before his wife, she became entitled to the term by survivorship, yet the lease was adjudged to be good; because the term commenced in *interest* immediately, although not in possession, and that the creation of such interest was an equal bar to the wife, as if her husband had granted the whole term (*b*).

A *trust*-term of wife is within husband's power.

And since the same rule of property must prevail in equity as at law, if the wife be entitled to a term for years held *in trust* for her benefit, the assignment or alienation of it by her husband will bind her surviving him (*c*). Accordingly,

A, the first husband of *B*, conveyed the residue of a term of thirty-one years to trustees for the separate use (*d*) of *B*, who, after *A*'s death, married *C*; *C* afterwards mortgaged the term, and he and the mortgagee assigned it to the plaintiff. Upon a bill by the assignee

---

(*a*) Ambl. 715. On the question of contribution, see Winslow v. Tighe, 2 Ball and B. 195. Stubbs v. Roth, Ibid. 548. (*b*) Grute v. Locroft, Cro. Eliz 287. See also Co. Litt. 46 *b*. 351; and 1 Roll. Abr. 343, pl. 15; and Theobalds v. Duffoy, 9 Mod. 102. (*c*) Bates v. Dandy, stated in next page. (*d*) This case, in deciding that the husband could assign a term held in trust for the separate use of his wife, is contrary to the rules at present established.

against the wife and her trustees, for an assignment of the legal estate, it was so decreed (*a*).

This was first determined and settled by the highest authority, the House of Lords, in *Sir Edward Turner*'s case (*b*), and it has in consequence been since followed and acted upon.

Except when the term is agreed by him to be settled on his wife.

It must, however, be noticed, as an exception to this rule, that if the husband, before marriage, consent to the settlement of his or his wife's term for her benefit, whether it be a legal term, or a term in trust for her, he cannot dispose of it after the marriage (*c*).

Husband's right to assign at law the elegit of his wife obtained by her before marriage.

Upon the principle, and in analogy to the rule last mentioned, if a woman recover a judgment at law, and sue out an *elegit*, and then marries; her husband will be at liberty to assign this interest of his wife, for or without a consideration, as he may think proper; so also a Court of Equity, in conformity with the legal rule, will allow to the husband the same unqualified power of assignment, when his wife *before* marriage has obtained a decree in her favour, to hold and enjoy lands until satisfaction, &c. (*d*)

And in analogy to this power, he may assign a decree, &c. obtained by her before marriage.

[And it seems that the assignment of the wife's equitable chattels real by the husband defeats her right by survivorship, though made without consideration (*e*).]

Husband's agreement to assign his wife's chattel interest is equivalent to an actual disposition of it.

It seems, that since an *agreement* to do an act is considered in equity the same as if the act were done, if the husband agree or covenant to dispose of his wife's term for years, or any part of it, such agreement or covenant will be enforced against her surviving him.

(*a*) Tudor v. Samyne, 2 Vern. 270. See also 1 Eq. Ca. Ab. 58, pl. 5. 1 Vern. 18. Prec. Ch. 418. 2 Atk. 208, 421. Lane, 54. Roll. Abr. 343. 4 Ves. Jun. 19. (*b*) 1 Vern. 7. (*c*) 1 Vern. 7. Draper's case, 2 Freem. 29. Bullock v. Knight, 1 Ch. Ca. 266. In the case of a legal term, it seems that the husband may assign it at law. (*d*) Casteret v. Paschall, 4 Vin. Abr. 57, pl. 20. 3 P. Will. 200. (*e*) Ibid. and 9 Ves. 99. See 4 Ves. 19. 528.

Thus, in *Bates* v. *Dandy* (*a*), *A*, being intitled in right of *B*, his wife, to two mortgages, the one in fee, and the other for a term of years (the legal estates in which were outstanding, but which were, by a memorandum signed upon a certain arrangement in *B*'s family, agreed to be assigned to her), borrowed 200*l*. of *C*, and by agreement under hand mentioned, that for the better securing of that sum, he had left the two mortgages with *C*, which he, *A*, was intitled to, and promised forthwith to assign them to *C*; but before this was done, *A* died. Upon a bill by *C* for payment or foreclosure, it was insisted by the wife, that since the mortgages were her *choses in action*, and as they had *not been assigned* by her husband, she was intitled to them. But *Lord Hardwicke* was of a contrary opinion, and said that *A*, being intitled in right of his wife to the *trust* of the mortgages, had power to assign them for his own use; and that leaving them with *C*, and giving his note promising to procure an assignment, amounted in equity to a disposition of them for so much as to satisfy the debt of *C*; and that the residue belonged to *B*, as her *choses in action*.

In the case of *Stead* v. *Creagh* (*b*), a long term of years was vested in the husband in right of his wife; he made an under-lease for ten years, and upon borrowing money of the lessee, he *covenanted* to grant him another lease to commence from the end of the ten years, and *to continue during the time he had any right*. The husband died before he made such lease; and it was decreed, that the covenant was a good disposition of the term in equity, because the husband had a power to dispose of it, and the covenant was such a lien as bound the right into whose hands soever the term came.

[The effect of the husband's agreement to make an underlease of his wife's term of years was discussed in

---

(*a*) 2 Atk. 207. (*b*) 9 Mod. 43.

Druce v. *Dennison* (*a*). The point did not ultimately call for a decision; but the *Lord Chancellor* intimated an opinion, that the agreement would be good against the wife, and that the rent would form part of the husband's estate. He observed (*b*), that as to actual leases, there was no doubt that, to the extent of the terms granted, the husband became owner. As to the agreements for leases his apprehension was, that in a Court of equity, the husband was to be considered owner of those interests: and he compared it to an assignment of the wife's choses in action, which though conferring no legal title, is supported in equity. On the case coming on again, his Lordship said that he should wish a search to be made on the point, whether it had ever been decided that an agreement would or would not bind the wife; and if it would, whether the rent was to be paid to her or the husband. If that point was untouched by decision, he thought that it would be found, that the analogy to other cases would make out, that an assignment in equity was to this purpose as good as an assignment at law, and he referred to *Stead* v. *Creagh*, as stating the principle.]

Upon the same principle, it is presumed, *Lord Redesdale* decided the case of *Shannon* v. *Bradstreet* (*c*); according to which, although a tenant for life with a leasing power do not actually grant a lease, yet if he enter into an *agreement* to do so, it will bind the persons in remainder.

Under-leases by husband will be good against his wife's surviving during the derivative terms.

The power which the law gives the husband to alien the *whole* interest of his wife in her chattels real, necessarily authorises him to dispose of it in part.

If, therefore, the husband be possessed of a term for forty years, in right of his wife, or jointly with her, demise it for twenty years, reserving rent, and dies, such demise or underlease will be good against her,

---

(*a*) 6 Ves. 385. (*b*) 6 Ves. 394. (*c*) 1 Scho. and Lefroy, 52. See also 15 Ves. 173.

although she survive him; but the residue of the original term will belong to her, as undisposed of by her husband (*a*).

Alienation by husband of wife's term upon condition: when and when not a disposition that will defeat her title by survivorship.

So also if the husband alien the whole of the term of which he is possessed in right of his wife, *upon condition* that the grantee pay a sum of money to his executors, and then dies, and the condition is broken, upon which his executors enter on the lands, this alienation by the husband will be a sufficient disposition to bar the wife of her interest in the term, it having been wholly disposed of by him during his life, and vested in the grantee (*b*).

It seems, however, that if the condition had been so framed that it might have been broken in the husband's lifetime, and he had entered for a breach, and then died before his wife without making any other disposition of the term, she would be entitled to it by survivorship; because the husband, by re-entry for a breach of the condition, was restored to the same right and interest in the term as he was possessed of at the time of the grant upon condition, viz. in right of his wife; so that as he took no other step to alter his interest in the term, it appears but reasonable that his wife's title by survivorship should be allowed in this instance, as in general cases (*c*).

Disposition of husband when good without a consideration.

Of such species of property, less than freehold, belonging to the wife and *in possession*, the husband may dispose either for a valuable or without any consideration. Some of such property are terms for years, statutes merchant, statutes staple, elegits, terms held in trust for the wife (*d*).

But a distinction must be observed when the disposi-

(*a*) Sym's case, Cro. Eliz. 33. 1 Roll. Abr. 344, pl. 10. Moor, 395. 6 Ves. 389. (*b*) Co. Litt. 46 *b*. (*c*) 2 P. Will. 366. Radford v. Young, 4 Vin. Ab. 50. pl. 15. (*d*) 3 P. Will. 200, and *supra*, p. 174.

tion is intended of the whole or of part of the property, and when as a *collateral* grant of something out of it.

Thus, if the husband pledge a term for years of his wife for a debt, and he either assigns, or agrees to assign, all or part of such term to the creditor, it has been shown in the case of *Bates* v. *Dandy* (*a*), that the transaction will bind the wife.

Collateral grants by him out of wife's term do not bind the wife surviving him.

But if the transaction be collateral to, and do not change the property in the term, as in the grant of a rent out of it; then, if the wife survive her husband, her right being paramount, and her interest in the chattel not having been displaced, she will be entitled to the term discharged from the rent (*b*).

Instance of husband's conveyance by bargain and sale being insufficient to pass his wife's interest in her term.

Suppose the husband to be possessed of a term for years in right of his wife, with remainder to himself in fee, and that he by deed enrolled, and in consideration of money, *bargains* and *sells* the lands, and dies, and his wife enters claiming the residue of the term. The opinion seems to be, that her claim was good. The reasons are, that by the bargain and sale nothing passed but an use; and that by creation and grant of the use, the term which the husband had in right of his wife did not pass; so that there being no disposition of the *legal* interest of the term, but only of an *use* (which in respect of the *inheritance* in remainder in the husband he might well create), the disposition as to the term was good only *during his life*; after his death, therefore, his wife was entitled to the residue of her term discharged from the effect of the deed, as she would have been if her husband had granted a rent, &c. out of it.

But the insertion of proper words will have that effect.

It appears that the above opinion is founded upon the circumstance of the conveyance being incompetent to pass the *legal* interest in the term. If, therefore, in

---

(*a*) *Supra*, p. 179. (*b*) Co. Litt. 184 *b*. 1 Roll. Abr. 344, pl. 5.

addition to the words, "bargain and sell," those of "grant, assign," or any other word had been introduced, which would have passed such interest, the claim of the wife would have been barred. But the words, "bargain and sell," under the statute of uses (*a*) could have no operation to raise an use to be executed in possession, except out of the remainder or reversion of which the husband was *seised*, as that statute speaks; so that, in the case above supposed, the term being a term in gross, of which the husband was *not seised*, but *possessed*, the bargain and sale only passed an *use* at *common law*, and not by the statute of uses; that use, then, not having been executed in possession was *collateral* to the land, and, like other collateral charges, it expired with the life of the husband, who created it, and left the term disincumbered for the wife (*b*).

Acts of husband other than express alienation amounting to a disposition of his wife's term.

As the husband is empowered by express alienation of his wife's chattels real in possession to devest her property, and defeat her right by survivorship, as it before appears; so he may by other acts produce the same effect.

Thus if the wife, at the time of her marriage, were a lessee for years, and her husband purchased or took a lease of the lands for both their lives; that act would amount to a disposition of the term, because by the acceptance of the second lease, the term was surrendered by operation of law, which surrender the husband was enabled to make under his general authority to dispose of his wife's chattels real in possession (*c*). Again—

A lease was granted *to* husband and wife for a term of years; they entered, and then the lessor enfeoffed the husband, who died seised during the wife's life; upon which she claimed the term against the husband's heir. The question was, whether the term was ex-

---

(*a*) 27 Hen. 8. c. 10. (*b*) Mo. pl. 304. Plowd. 423. 1 Bac. Abr. Tit. Baron and Feme, 478, Ed. by Gwill. (*c*) 2 Roll. Abr. 495, pl. 50, and see *supra*, chap. 3, sect. 2.

tinguished? And it was determined, that the acceptance of the feoffment destroyed the term; for by such acceptance the husband admitted the lessor's power to enter and make livery, which the lessor could not lawfully do during the continuance of the term; so that of necessity this admission by the husband amounted to a surrender of the term; and the Court proceeded to declare, that if the conveyance to the husband had been by bargain and sale enrolled, or by fine, the term would not have been extinct (*a*).

[Where the wife was intitled to a leasehold estate, subject to a mortgage, and upon a transfer of the mortgage the husband covenanted for payment of the money, and the equity of redemption was reserved to the husband and wife, their executors, administrators, and assigns; it was held that the wife's right by survivorship was not affected (*b*).

Equity of redemption on mortgage of wife's chattels real.

If the husband mortgages the wife's term, and by payment of the money at the day, the estate of the mortgagee ceases, it seems that the interest of the wife in the term will not be affected (*c*). If the money be not paid at the day, the estate of the mortgagee becomes absolute, and the alienation of the term being complete at law, the wife's legal right by survivorship is defeated; and if the equity of redemption were reserved to the husband alone, it seems that her right will also be defeated in equity, by analogy to the cases in which it has been held that she is bound by the husband's voluntary assignment of her equitable chattels real (*d*). But if the equity of redemption were reserved to the husband and wife, she would be entitled to it by survivorship (*e*). If, in either case, the husband, after the estate of the mortgagee has become absolute,

---

(*a*) Downing v. Seymour, Cro. Eliz. 912. (*b*) Pitt v. Pitt, 1 Turn. Ch. Rep. 180. (*c*) See *ante*, p. 181, and Radford v. Young, cited there. (*d*) *Ante*, p. 178. (*e*) See Pitt v. Pitt, *ub. sup.* and Jackson v. Parker, Ambl. 687.

pays the money and takes an assignment to himself, the property will be altered, and it seems that the wife's right will be excluded (*a*). The husband's agreement to mortgage the wife's term will, however, only be enforced against her to the extent of the money due (*b*).]

If husband and wife be evicted of a term which he enjoyed in her right, and he commence an action of ejectment *in his own name*, and obtain judgment, the recovery will change the wife's property in the term, and vest it in the husband (*c*); because it is a reduction of the term into his own possession; but if he had joined his wife in the action, then the judgment being *joint*, their interests would have been the same as before the eviction; so that if the wife survived, she would be entitled to the residue of the term by survivorship.

Effect of husband's proceeding at law in his own name only for recovery of her term, as to defeating her right by survivorship.

It seems, that if there be a dispute between the husband, claiming a term of years in right of his wife, and another person relative to their *title*, and they refer the matter to arbitration, and an award is made of the term to the husband, the property in it will be changed by the arbitrament, so as to amount to a reduction of the term into possession, which will defeat the wife's right by survivorship (*d*).

Effect of an award of wife's term on her title by survivorship.

Accordingly in *Trusloe* v. *Yewre* (*e*), it was said to

(*a*) On these points see Preston on Abstracts, vol. i. p. 345. (*b*) Bates v. Dandy, 2 Atk. 207. (*c*) 1 Roll. Abr. 345, pl. 10. Co. Litt. 46 *b*. But see 4 Vin. Ab. 50, pl. 18, in marg. where it is said that the husband shall have the term in *statu quo*, and that it shall go to the wife if she survive. The judgment in ejectment does not alter the title by which the estate is held. (*d*) 1 Roll. Abr. 245. 1 Vern. 396. (*e*) 2 Leon. 104. Cro. Eliz. 223, S. C. Vid. *contra*, the cases in Vin. Ab. Arbitrament, A and Doe dem. Morris v. Rosser, 3 East, 11; from which it appears that an award alone does not pass the property, either in a freehold or leasehold estate. In a case, in Dyer, 183 *a*, one moiety of the wife's term was awarded to one claiming title to it. The question whether the wife surviving was bound, was left undecided. If the award be carried into effect by an assignment, the wife will, of course, in

have been agreed, that if a controversy arise between two persons about the *title* to a lease for years, and they submit the question to arbitration, and the arbitrators award that one of them shall have the term, this is a good gift of the *interest* in it. But that if the award be that one shall permit the other to enjoy the term, it will be no gift of the interest in the term.

But in all cases the transaction must be such as to change the joint interest of husband and wife.

Hence the transaction, whatever it may be, if not of a description to effect a complete alteration in the nature of the joint interest of the husband and wife in the term, will be insufficient to bar her right by survivorship.

Equivalent to the husband's power of alienation of his wife's term or trust-term, is the disposition which the law makes of it in instances of his misconduct (*a*).

Thus, if he commit waste, the term will be forfeited (*b*).

By waste, outlawry, attainder, conviction, or his being found felo de se.

So also his outlawry or attainder for felony, or his conviction of any such crime, will be followed by the same consequence (*c*). Again—

If he be found *felo de se*, that will be a forfeiture of his wife's term, whether it be hers alone, or whether it had been granted to her and her husband jointly.

And if he have a term for years in his own right, and another in right of his wife, his forfeiture will extend to and comprehend both the terms (*d*).

Husband's creditors.

The power of the husband over his wife's term for years may be taken advantage of by his creditors during the marriage.

Wife's term may be taken in execution by them during the marriage.

If, then, he be possessed of such a term in right of his wife, it may be sold under a *fieri facias* (*e*). But

---

either case, be bound. On the question of the operation of the award in equity, if not carried into effect before the husband's death, see *ante*, p. 179, and Oglander v. Baston, 1 Vern. 396, cited *post*, sect. 4. (*a*) 1 Roll. Abr. 851, pl. 50. (*b*) Co. Litt. 351. (*c*) Ibid. 4 Black. Com. 387. (*d*) Jenk. Rep. 65. 2 Black. Com. 421. 4 Black. Com. 387. (*e*) Co. Litt. 351. 1 P. Will. 258.

although it may be *extended* or *sold* for the satisfaction of his debts, yet if that be not done during his life, and his wife survive him, the term in her possession will be discharged from the demands, because she claims it paramount her husband, and therefore exempted from the claims of all persons deriving titles under him.

III. With respect to the interest of the husband in, and his power over the personal estate and real chattels of which his wife is possessed or entitled to as *executrix* or *administratrix*, and his liabilities on account of the same, proposed to be considered in this section; these subjects will be treated of under the following heads:—

1. The husband's interest in and power over such property during the marriage.

2. The wife's power to dispose of it by will.

3. Whether the wife is to sue singly or jointly with her husband for the recovery of outstanding assets.

4. The liabilities of husband and wife jointly and singly for *devastavits*.—And,

5. When the wife's death, during legal proceedings against both of them for her *devastavit*, will and will not discharge her husband.

1. In the last section it appeared that marriage was an absolute unqualified gift to the husband of all the goods and *personal* chattels which his wife was absolutely possessed of at that time, or became so afterwards in her own right, whether he survived her or not.

Marriage is no gift to husband of property belonging to wife *in autre droit*.

Marriage, however, makes no such gift to him of the goods and chattels which belong to his wife *in autre droit*, as executrix or administratrix; because such a gift might prove disadvantageous to the creditors, &c. of the testator or intestate; besides, since the wife takes no beneficial interest in the property, there is none such which the law can transfer to him (*a*).

But he may administer in her right, and dispose of the property.

But the husband is entitled to administer in his wife's

(*a*) Co. Litt. 351. 11 Mod. 178.

right, for his own safety, lest she misapply the funds, for which he would be liable. Incident to this right he has the power of disposition over the personal estate vested in his wife as executrix or administratrix (*a*).

Thus in *Arnold* v. *Bidgood* (*b*), the husband being possessed of a lease of tithes in right of his wife an executrix, granted all his right, title, and interest in them; and it was determined that they passed to the grantee.

So also in *Levick* v. *Coppin* (*c*), the residue of a term of years being vested in the wife as administratrix, her husband released it to the plaintiff, and the release was held to be good.

And release debts.

Upon the same principle the husband may release debts owing to the estate of the testator or intestate, to whom the wife is executrix or administratrix (*d*).

As to merger

If he be entitled to a term for years in her right as executrix or administratrix, and have the reversion in fee in himself, the term will not be merged; because a man may have a freehold in his own right and a term for years *in autre droit;* and it seems essential to merger, that the term and the freehold should vest in a person in one and the same right (*e*).

Wife cannot administer without her husband's concurrence.

As the husband is answerable for his wife's acts, she is not permitted to administer without his concurrence, nor will payments made to her as executrix or administratrix without his consent be valid (*f*).

But she may bequeath such property without her husband's consent.

2. Since the husband has no beneficial interest in the personal estate which the wife takes in the character of executrix; and as the law permits her to take upon herself that office, it enables her, in exception to the general rule that a married woman cannot dispose of

---

(*a*) Jenk. Rep. 79. (*b*) Cro. Jac. 318. (*c*) 2 Black. Rep. 801. 3 Wils. Rep. 277, S. C. (*d*) Br. "Baron and Feme," pl. 80. (*e*) Co. Litt. 338 *b*, and see 3 Term Rep. 401. 2 Roll. Rep. 472. 1 Roll. Abr. 934, pl. 10, 11. Cro. Jac. 275. (*f*) 1 Salk. 282.

property, to make a *will* in this instance, without the consent of her husband (*a*), restricted, however, to such articles to which she is intitled as executrix. The effect of such an instrument is merely to pass, by a *pure right of representation* to the testator or prior owner, such of his personal assets as remain outstanding; and no beneficial interest which the wife may have in any part of them (*b*): and with respect to the assets which may have been received by the feme-executrix during the marriage and not disposed of, they immediately become the husband's property, and are not affected by the will (*c*).

Effect of such a will.

The proper probate in this case is one with the wife's will annexed, limited to the goods which she was intitled to possess as executrix; under which probate no other property can be recovered (*d*).

Probate of it.

3. As the property in the personal estate which the wife takes as executrix or administratrix before the marriage is in herself, her husband cannot sue nor be impleaded concerning such estate without the wife being joined as a party (*e*).

As to their joining and not joining in actions for recovery of property due to the wife *in autre droit;*

This rule, however, admits of exceptions; for if the husband alter the nature of the debt owing to his wife, in the character of executrix or administratrix, he *alone* may bring the action for recovering it.

Thus, if he were to indulge the debtor with further time, in consideration of an express promise to pay the money to the husband, &c. he alone may compel payment of it by action, for by the promise, it became in law his own money, although when received a *devastavit*, if not properly administered; so that joining the wife in the action would be error (*f*). He may also

---

(*a*) 8 Vin. Ab. 42, pl. 9. 4 Burn, 56. 2 East, 552. (*b*) 15 Ves. 156. (*c*) Hodsden v. Lloyd, 2 Bro. C. C. 534. (*d*) On this subject see *ante*, p. 170 et seq. (*e*) Godb. 40. 11 Mod. 177. Sid. 299, pl. 4. (*f*) Yard v. Ellard, 1 Salk. 117. pl. 8. Carth. 463. Sid. 299.

hands of his executor, upon the principle that the misapplication of the husband was of *trust* property, and of his obligation by such trust to apply the funds received by him in discharge of debts and legacies, and the surplus according to the will of the wife's testator; or if it were intestatcy, then according to the statute of distribution.

The cases considered.

The cases establishing this head of equity are collected and commented upon by *Lord Redesdale*, in his elaborate judgment in *Adair* v. *Shaw* (*a*). He there expressed his disapprobation of the report of *Beynon* v. *Gollins* (*b*), and afterwards proceeded to the examination of the other cases last alluded to. He observed, that the first case which showed most clearly what Courts of Equity thought upon the subject of charging the husband upon his own *devastavit* of assets belonging to his wife, as administratrix or executrix, when she died leaving him the survivor, was *Sanderson* v. *Crouch* (*c*).

In that case a man married an administratrix, who had *previously* wasted part of the assets; a bill was filed against them for a distribution, and she died. The Court declared that her husband was to be no farther charged, than with what was possessed or came to *his*, or to his wife's hands *after* their inter-marriage. By this declaration, the Court showed its understanding to be, that for the waste committed by the wife *before* the marriage, her death absolved her husband, upon the principle before stated; but for what came to *both* their hands *after* the marriage, her death did not discharge his liability to answer.

In allusion to the case of *Batchelor* v. *Bean* (*d*), his Lordship observed, that it was decided but a year and a half before *Sanderson* v. *Crouch*; and that although it did not clearly appear what was the decision, yet that

---

(*a*) 1 Scho. and Lefroy, 243. (*b*) 2 Brown, C. C. 323. 2 Dick. 697. (*c*) 2 Vern. 118. (*d*) 2 Vern. 61.

on comparing the two cases together it would be found that the same kind of determination was made in both of them.

The next case which he considered was *Norton* v. *Sprigg* (*a*). This, said his Lordship, was a very short and confused note. The question was on exceptions to the master's report, how far a *second* husband should be charged in his own estate for a *devastavit* committed by his wife and her *first* husband. The Court said, that where there was a bond there was a *lien* by deed, therefore the second husband was bound; but that where there was merely a breach of trust or debt by simple contract, there in equity the plaintiff ought to follow the estate of the wife, in the hands of the executor of the first husband. Upon this declaration, *Lord Redesdale* observed, it was difficult to discover its exact meaning, but it seemed to import, that the second husband should be relieved out of the assets of the first, viz. if the first husband possessed himself of assets of the testator, then the second husband, who was chargeable with the wife's debts, was intitled to be relieved out of the estate of the first husband, he having possessed himself of that which was not given to him by the marriage, and of which he had no other right to possess himself than for the purpose of protecting himself against the demands of the testator's creditors, to which he was liable as the husband of the administratrix; that it seemed there was a right in this case in the second husband *to redeem*, by following the assets of the first husband to recover what had been received by him; but that nothing could be inferred from the case, except that was the understanding of the Court, which might be guessed to have been so, from the note in 1 *Equity Cases Abridged* (*b*), referring to *Gilpin* v. *Smith*, which determined, that if there were no assets of the first

The liability and the equity of a second husband on a devastavit by the wife and her first husband.

(*a*) 1 Vern. 309.

(*b*) P. 60, pl. 4.

husband, the second husband must pay the debt of the wife; hence implying that if there were assets of the first husband, the second was intitled to be relieved out of them. But his Lordship said, that *Gilpin* v. *Smith* (*a*) did not warrant what was said of it. It was there held, that when a wife, after the death of her first husband, entered and took the profits (of lands settled for the payment of debts), and married again, and she and her second husband continued to take the profits, and he dying, she married a third husband, who also continued to take the profits, such third husband was bound to answer, not only for the profits received by himself and his wife, when sole, but also for what had been received by the second husband; that *Maynard* in argument said, that both in law and equity *Smith* and his wife were answerable for the profits taken *by* the wife, and afterwards by her second husband; as if wife tenant for life marry, and the husband commits waste, and dies, an action of waste lay against her. But *Lord Redesdale* observed, that waste did not in that case lie at law against the executor of the husband; yet according to the case of *Sherrington* and other cases, if the waste had been of a *profitable* nature, the assets of the second husband would have been answerable and *reasonably* so, in relief of the wife and her third husband; nevertheless the wife and third husband would be *prima facie* liable to creditors, upon which ground these cases went.

Wife and second or third husband liable to creditors for a preceding devastavit by her and former husband.

The next case which came in review was *Powell* v. *Bell* (*b*). There an administratrix having wasted great part of the assets before her second marriage, a suit was instituted for an account of the estate against her second husband after her death. By the decree an account was directed of what had come to her hands before her second marriage; and it was declared that the plaintiff

---

(*a*) 1 Chanc. Ca. 80.

(*b*) 1 Eq. Ca. Abr. 61. Pre. Ch. 255, S. C.

should have satisfaction absolutely against the second husband, for so much as came to *his* hands, *after* marriage, and to have satisfaction against him for what came *to her* hands *before* the second marriage, so far as he had any estate of the wife; which *Lord Redesdale* understood to mean, so far as the second husband had any estate in the character of her *administrator*.

Husband's liability as administrator of his wife.

Upwell v. *Halsey* (*a*) was now considered by his Lordship. *A* gave personal property to his wife for life, and then to his sister, and appointed his wife executrix. She married *Halsey*, and died. It was decreed that *Halsey* should account for what came into his hands. In that case, the wife possessed the property, and retained the surplus as executrix; she was a *trustee* to pay herself the interest for life, and to preserve the capital for her first husband's sister. The second husband was decreed to account for so much as came to *his* hands, but was not made answerable for what his wife might have wasted before the marriage: it was considered that the money being trust money, the marriage was not a gift of it to him; and he was held bound by the same trust of it as his wife.

Where the testator's assets may be followed into the husband's hands.

The case of *Pagett* v. *Hoskins* (*b*) proceeded upon the same principle. Any *specific* assets of the wife's testator may be followed into the hands of the husband after her death, and so, as in that case, although *not* in specie, if the husband had *notice* that they were the goods of the testator.

The last case noticed was *Sturt* v. *Harvey*, the decision in which *Lord Redesdale* considered as the course of the Court established in a number of cases. *Harvey* had married the mother of *Mrs. Sturt*. *Mr. Sturt* got a large fortune with his wife, and filed a bill to obtain different properties out of *Harvey*'s hands. The cause was heard in *February*, 1771; and part of the decree

(*a*) 1 P. Will. 651.

(*b*) Pre. Ch. 431.

was, that *Harvey* should account for such of the personal estate of his wife's former husband as had come to *her* hands *before* her marriage with him (*Harvey*), or to *his* own or his wife's hands since; and that he should be answerable for what had come to their or either of their hands *since* the marriage, and for what had come to *her* hands *before*, that he should be answerable out of her assets, if he admitted any; and if he made no such admission, then that an account of them should be taken.—The rule in *Sanderson* v. *Crouch* was here proceeded on, and the same kind of decree made. His Lordship said he was convinced, that from the manner in which the decree in *Sturt* v. *Harvey* was expressed, that it was considered as the *settled* rule in Chancery at that time. The principle is the same as in the other cases, that goods which a wife takes in *autre droit* are not given by the marriage to the husband; but that he, in taking, holds them subject to the *trust* to which they were subject in the hands of the wife.

As to wife's personal liability to answer for devastavits after her husband's death.

The husband's liability to answer for his wife's and his own devastavits of assets, which came to their hands in her right as executrix or administratrix, having been considered, her responsibility after his death, for waste of the assets committed before and subsequently to the marriage, is the next subject which presents itself for consideration.

Distinction as to this when the wife was executrix before, and when after marriage.

A distinction must be attended to when the wife is executrix or administratrix *before* the marriage, and when she becomes so *afterwards*. In the first case, if she survive her husband, it seems that she will be liable to answer not only for her own wrongful acts in the administration previously to the coverture, but even for those of her husband during the continuance of the marriage (*a*); because her title as executrix or admi-

---

(*a*) Bellew v. Scott, 1 Stra. 440. 1 Sch. and Lefroy, 261.

nistratrix having commenced and become complete before the marriage, it was her own folly to take a husband who would so misconduct himself as to waste her testator's or intestate's assets. But in the second case, the act of the husband, in obtaining probate or letters of administration in his wife's name, if against or without her consent, and she does not afterwards intermeddle in the administration, is an act from which she may dissent after his death by renunciation, and avoid the consequences of his misconduct (*a*). In allusion to this, the Court of *Common Pleas* in *Stokes* v. *Porter* (*b*) said, "that some possession was colourable, yet none in law to charge, &c., as in the instance of a wife executrix who did not intermeddle, &c., and renounced after her husband's death."

Wife's consent to administration during the marriage will make her personally liable upon surviving her husband.

If, however, the husband procure probate or letters of administration in his wife's name and *with her consent*, then it seems that she surviving him will be personally answerable, upon the insolvency of his estate, for the waste committed by him of her testator's or intestate's assets; because she by her own act and assent having assumed the office of executrix or administratrix, and being the only *legal* personal representative of the testator or intestate (which distinguishes this case from that before mentioned, of the husband's discharge by her death from her *devastavit*, he being neither executor nor administrator), became liable with her husband for every act relating to it; and an action or suit lay against both of them, and upon his death the right of action survived against her. In an *anonymous* case in *Croke Charles* (*c*) (a case of trespass, where the husband died after verdict obtained against himself and wife), the Court said, it was clear that if the husband survived his wife he was chargeable, and the reason was the same for charging her when she was the survivor.

(*a*) Wentw. Off. Ex. chap. xvii. p. 206. (*b*) Dyer 166 *b*.
(*c*) Page 509.

And in *Rigley* v. *Lee* (*a*), a verdict in ejectment having been obtained against husband and wife, he died before the day *in banco*; and the Court held that there was no abatement, because the action was in the nature of trespass, and the wife was charged for her own fact; therefore, that the action continued against her, and the judgment should be entered against her *sole*.

At law creditors only can enforce these liabilities.

But at *law* these liabilities can be enforced only at the suit of *creditors*, because legatees cannot maintain an action against an executor or administrator (*b*), their relief being only in a Court of Equity or in the Ecclesiastical Court.

As to the right of legatees to do so in Equity.

Although legatees be without remedy in Courts of Law, yet Courts of Equity will interfere in their behalf against the husband of a *feme*-executrix or administratrix, who has applied the assets to his own use; but whether these Courts will assist them against the surviving wife, to make her responsible for the *devastavit* of her husband or of herself during the marriage, is not, I believe, settled by any express adjudication. The answer given to legatees in Courts of Law is,—We will not interfere for you; there is a more competent jurisdiction for the administration of assets, a Court of Equity, to which we refer you. This is the reason why a legatee cannot maintain an action at law. It is not because he has no right nor title; but his right or title is referred to another court, which from its constitution and forms can more effectually administer justice in a case which is connected with the account and administration of assets, than the forms of a Court of common Law allow. The objection, therefore, that because a legatee cannot recover against the surviving wife at law, he ought to have no relief in equity, is untenable. Upon what principle of justice, then, does the claim of a legatee stand to compel the surviving wife to answer

---

(*a*) Cro. Jac. 356. et vide Horsey v. Daniel, 2 Lev. 161.
(*b*) Deekes v. Strutt, 5 Term Rep. 690.

his demand on account of a *devastavit* committed either by herself or her husband during the marriage? It is founded upon the equity of the legatee to be paid out of assets belonging to the testator, which, in breach of the *trust* that the law confided to the wife, have been either wasted by her, the sole and proper legal personal representative, or by her husband, whom she, by her own act and consent in taking that office, empowered to commit the *devastavit*. Since at law, therefore, as it seems, the right of action by creditors survived against her, so in equity, it would also seem, the equitable demand of the legatee also survived. *Lord Redesdale* expressed a strong opinion in favour of legatees in the case of *Adair* v. *Shaw* (*a*) before referred to.

In that case, *Crymble* the elder, by a sixth codicil, bequeathed his residuary personal estate to trustees, to be invested in the purchase of lands, to be settled to such uses and upon such trusts as certain estates in the counties of *Antrim* and *Carrickfergus*, were expressed by the codicil to have been devised and limited by his will to *Charles Crymble* the younger and his issue in tail male, but in fact to *Charles* for life, and to his first and other son and sons in succession in tail male; with remainder in like manner to *William Crymble* and his sons; with remainder to *Charles Adair* for life, and to his sons successively in tail male, &c. The trustees and executors named in the will declined to act, and administration *pendente lite* was granted to the defendant *Mrs. Shaw*, mother of the first tenant for life, and then the wife of *F. Shaw*. Prior to this grant, a suit had been instituted in the Ecclesiastical Court for administration, and a bill had been filed in equity to preserve the property in the mean time. These suits were discontinued, and a compromise made between *Shaw* and

---

(*a*) 1 Scho. and Lefroy, 243.

wife and *Crymble* the younger; and they paid to him the whole residuary personal estate. By the deaths of *Charles* and *William Crymble* without heritable issue, the right to the remainder in the lands to be purchased with the residue became vested in *Charles Adair* for life (who also became the testator's legal personal representative), with remainder to his eldest son *Thomas Adair* in tail male. They filed a bill against *Shaw* and wife and others, to have the residue invested under the will and codicil, he and they having compromised a suit which had been commenced by him for the same purpose. *Mr.* and *Mrs. Shaw* admitted that she had received assets to the amount of 10,000*l.* and that she had paid to *Charles Crymble* the clear residue, under the impression that he was entitled to it, she having been advised, that if it had been laid out in the purchase of lands he would have had complete dominion over it. Her husband *F. Shaw* then died, and the suit was revived against his executors, charging him with a *devastavit*, and that his assets were liable to the demand in respect of it; but his executors insisted that *Mrs. Shaw* alone administered, and that her husband being only liable to her debts during the marriage, and no judgment or decree had been obtained against him during its continuance, his assets were not liable. *Lord Redesdale* held that *Mrs. Shaw*, in paying legacies and disposing of the residue, exceeded her power under the letters of administration *pendente lite*; they merely authorising her to collect the assets and to pay the debts: that she was responsible, and her husband's assets also, to this extent, viz. she for the whole, and her husband's assets for whatever came to the hands of himself or wife during the marriage, except so far as he left assets in *specie* at his death which might have come to his wife's hands, and that for what might have been so left he would not be answerable, but his wife only; that the personal demand against the surviving wife was a necessary consequence of the acts in which she

What authority letters of administration *pendente lite* give.

concurred, and that at law she would be responsible to the creditors of her testator, although not to the residuary legatees, for the reason before mentioned. By the decree it was declared (amongst other things, after giving the usual directions), that whatever assets of the testator *Crymble* came to *Mrs. Shaw*'s hands *after* her husband's death should be answered by her; and that whatever came to his executors' hands should be answered by them, and that if any of the original testator's assets remained in specie in the husband's hands at his death, which came to the possession of his executors, they were to account for them, answering personally for their own receipts, and for their testator's receipts out of his assets; and further directions were reserved in regard to *Mrs. Shaw*, if her husband's personal estate should be insufficient to pay what was due from it. The result was, that *Mr. Shaw*'s assets were greatly deficient to pay what was found due from him on account of his and his wife's receipts of the testator's estate. The residuary legatees, therefore, applied to the Court for a *personal* decree against *Mrs. Shaw* for payment of the amount of the deficiency; but no order was made upon it, as the plaintiffs seemed disposed not to press their claims against her. On that occasion *Lord Redesdale* said, that as to creditors the wife would be clearly responsible, and that the *inclination* of his mind was to hold her responsible in this case also; since, although under the controul of her husband, her taking out administration was nevertheless a voluntary act, which she might have refused to have done.

5. It has been before noticed, that the husband, when he has not by his own acts made himself responsible, is only liable for his wife's *devastavit* whilst the marriage subsists between them; so that when it determines before a judgment or decree is obtained against them for the demand, his or his wife's death discharges his liability.

What proceedings at law will fix the husband with his wife's devastavit after her death, and what not.

There is a peculiarity attending this demand, and the proceedings to recover satisfaction for it, which it is necessary to consider, for the purpose of showing at what period of those proceedings the death of the wife will or will not at law exonerate her husband from answering for her *devastavit*.

An action to recover a debt owing by a testator can be brought only against the person standing in relation to the testator as his legal personal representative; that person, in the case now under consideration, is the wife, executrix or administratrix, and her husband is made a party *pro formâ*. The first judgment is, that the debt shall be paid *de bonis testatoris*; it affects only the testator's estate, and creates no personal liability in the husband to satisfy the demand. Upon this judgment the plaintiff may proceed at his election in one of two methods, either by suing a *fieri facias de bonis testatoris* directed to the sheriff, to which if he return *nulla bona*, then upon a suggestion of a *devastavit*, a *scire fieri* will be directed to him to levy the debt *de bonis testatoris*; or if that cannot be done, then to inquire by a jury as to the commission of a *devastavit*; and if it be so found, then to summon the parties to appear in the Court above to show cause why execution *de bonis propriis* should not issue. If the sheriff return to this compound writ *nulla bona*, and a *devastavit* upon the inquest, and the fact of a *devastavit* having been committed be confirmed upon proceedings above; then judgment *de bonis propriis* will be given, and although the wife happen to die after such judgment, and before any proceedings are had under it, yet her husband will remain chargeable, his liability having been fixed by the judgment *de bonis propriis* (*a*).

(*a*) Kings or Knights v. Hilton, 1 Roll. Abr. 931, pl. 11. Cro. Car. 603, S. C. Eyres v. Coward, 1 Sid. 337. Obrian v. Ram, 3 Mod. 189.

The other and more usual mode of proceeding upon the first or original judgment is, by an action of debt upon it, suggesting a *devastavit;* and which action either may or may not be brought after or without suing any *fieri facias* upon the first judgment (*a*). If the wife die before judgment be obtained in this action, the husband will be discharged. The whole may be summed up thus: that no proceedings can be had either by action of debt upon a *devastavit*, or by a *scire fieri* inquiry against the husband of an executrix, if she die after judgment against her and her husband *de bonis testatoris;* but that if a general judgment be had against them either upon the *scire fieri* or in the action of debt, and then the wife dies, her husband will be bound, and must answer personally (*b*).

IV. In regard to the husband's interest in, and power over his wife's personal estate and real chattels that are not in possession, but are *immediately* recoverable by action at law or suit in equity, we shall consider those subjects under the following heads:—

1. The husband's rights in such his wife's *choses in action;* also the consequences of his death before her, whilst the property remains outstanding; and his title when he happens to be the survivor.

2. What will and will not be a reduction of those *choses in action* into his possession, so as to bar her right by survivorship.—Under which subdivisions will be considered:—

First.—The effect of an attempt only to reduce them into possession, or at least an incomplete act for the purpose.

Secondly.———of actions at law and suits in equity to vest them in the husband.

(*a*) Wheatley v. Lane, Sid. 397. Skelton v. Hawling, 1 Wils. 258. Erving v. Peters, 3 Term. Rep. 685. (*b*) Bacon v. Berkley, 1 Lutw. 670. Mounson v. Bourn, Cro. Car. 519.

Thirdly. The effect of awards, and the wife's agreement *in pais pendente lite* upon her title as the survivor; and,

Fourthly.————upon the same right, of the receipt of the money by, or transfer of the funds to the husband, and also of his release of them.

1. Property falling under the description of *choses in action* of the wife, are debts owing to her, arrears of rents, legacies, residuary personal estate, money in the funds, &c.

Rights of husband in his wife's choses in action.

Marriage is only a qualified gift to the husband of his wife's choses in action, viz. upon condition that he reduce them into possession during its continuance; for if he happen to die before his wife without having reduced such property into possession, she, and not his personal representatives, will be intitled to it (*a*).

In *Scawen* v. *Blunt* (*b*), *A* was intitled under the will of *C* to real estates for life, but if she married, the fee simple was given to her; if she did not marry, the property was given over after her death to *B*, the wife of *D*, and her heirs. The estate was sold with the consent of all persons interested in it, but in the conveyance no trust was declared of the purchase money, which was paid to *A*, and by her delivered to trustees, who invested it in stock, and the interest of it was paid to *A*, who was unmarried when the bill was filed. *B* survived her husband *D*, and bequeathed to *A* all her personal estate. *Sir William Grant*, M. R. determined, that the rights of the persons named in the will in the *stock* were the same as they had in the land under the same will, upon the doctrine of resulting trusts; that the stock was in the nature of a *chose in action*, which not being reduced into possession by *D*,

---

(*a*) Co. Litt. 351. (*b*) 7 Ves. 294. See also Langham v. Nenny, 3 Ves. 467.

survived to his wife *B*, and passed by her will to *A*, who thereby became intitled to the money absolutely.

When he survives her.

But if the husband survive his wife, then he, as her administrator, will be intitled to all her personal estate which continued in action or unrecovered at her death. And although he die before all such property be recovered, yet his next of kin will be intitled to it in equity. But the wife's next of kin will be intitled to letters of administration, *de bonis non*, &c. of her estate not received by her husband during his life (*a*); they, however, will be trustees of what they receive under them for the next of kin of the husband (*b*).

[If the wife be a mortgagee in fee, the husband surviving her will be intitled to the mortgage as her administrator, and her heir will be a trustee for him. This was admitted in *Turner* v. *Crane* (*c*), where however the heir was held intitled on the ground that there was no covenant for payment, a distinction which does not now prevail (*d*).]

Arrears of rent: in what cases they belong to the husband or wife surviving.

With respect to the husband's title to arrears of rent, it has been observed in the second section (*e*), that if the husband die before his wife, and rent is in arrear, which was reserved to them jointly on a subdemise of her leasehold estate, she, as it was considered, will not only be intitled to the accruing rent, but also to that in arrear, but that if she were not a party to the derivative lease, or if she were a party and the rent was reserved to the husband alone, then that the arrears and future rent would belong to her husband's representatives.

(*a*) The practice of Doctors Commons is against Mr. Hargrave's opinion in his Law Tracts, p. 475. (*b*) 1 P. Will. 378—381. Humphrey v. Bullen, 1 Atk. 458. Elliot v. Collier, 3 Atk. 526. In Burnett v. Kinaston, according to the reports in 2 Freem. 239. and Prec. in Ch. 118, the contrary was held, but the point is now settled. (*c*) 1 Vern. 170. 2 Ch. Rep. 242. (*d*) See Powell on Mortgages, vol. 2, p. 683. (*e*) *Supra*, p. 174.

So also the arrears of a rent service, of which the wife was, or of which she and her husband were seised, or of a rent granted to both of them during the life of the wife, will belong to her if she survive him (*a*); because the principals which survived to her carried also all that was due in respect of them (*b*). But if he be the survivor, then he becomes intitled to the arrears as her administrator, as before mentioned (*c*).

In a case where the wife and her *second* husband demised lands, which she held in dower from her *first* husband, for a term of years, reserving a rent; the rent became in arrear, and then the wife died. Her second husband is intitled to the arrears, and not the heir of the first husband, who cannot claim them, since he is a stranger to the lease (*d*).

[So if a lease be made by the husband and wife of her lands, not conformable to the statute, 32 Hen. 8, c. 28, and after his death she elects to confirm it, she is it seems intitled to the arrears of rent (*e*).]

Remedy for surviving husband to recover rent in arrear after his wife's death, due before the marriage.

It must be noticed that at common law, if the husband seised in fee, fee-tail, or for life, in right of his wife, of a rent-charge, did not recover during his wife's life, arrears which became due to her *previously* to their marriage, he could not after her death compel payment of them; because they being in action only *before* the marriage, the law merely gave him the power of recovering them whilst his wife lived (*f*). But this inconvenience is now remedied by the statute of *Henry* the eighth (*g*), which declares, that "if any man who now hath, or hereafter shall have, in right of his wife,

---

(*a*) Co. Litt. 351. Brown v. Dunnery, Hob. 208. (*b*) Temple v. Temple, Cro. Eliz. 791. Roll. Abr. 350, pl. 4 and 5. Salwey v. Salwey, Ambl. 692. 2 Dick. 434. (*c*) See 29 Char. 2, c. 3, s. 25. 1 Roll. Abr. 345, pl. 35. Brown v. Farndell, Carth. 51. (*d*) Bro. Tit. Rents, fo. 297 *b*, pl. 10. (*e*) 4 Vin. Ab. 118, pl. 4. (*f*) Co. Litt. 162 *b*, 351 *b*. (*g*) 32 Hen. 8. chap. 37. sect. 3.

any estate in fee simple, fee-tail, or for term of life, of or in any rents or fee-farms, and the same rents or fee-farms now be, or hereafter shall be, behind or unpaid in the said wife's life; then the said husband, after the death of his wife, his executors and administrators, shall have an *action of debt* for the said arrearages against the tenant of the demesne that ought to have paid the same, his executors or administrators; and also may *distrain* for the same, in like manner and form as he might have done if his wife had been then living (*a*)."

It seems that copyhold lands charged with a rent are within the provisions of the statute (*b*).

[This statute in terms applies only to rents in fee simple, fee-tail, or for life. But in one case (*c*) arising upon the first section (which is in this respect to the same effect as the third), it was ruled at *nisi prius*, that rents reserved on leases for years were within the statute, though the reasons for giving it this extended construction do not appear. In two late cases (*d*) the point was discussed, but the decision turned upon other grounds. In Co. Litt. 162, *a*. where a detailed exposition of the statute is given, no mention is made of its application to any other rents than those which it expressly comprises; in two other cases (*e*) it was considered not to extend to rents on leases for years: and the same opinion is expressed by *Mr. Justice Buller*. Supposing this to be the effect of the statute, it follows that the husband will not be able to distrain after his wife's death for arrears of rent due

---

(*a*) See 4 Rep. 51 *a*. (*b*) Gilb. Ten. 187. *Contra*. Bull. N. P. 57. Appleton v. Doily, Yelv. 135. Brownl. 102. Watk. Cop. vol. 2, p. 182. (*c*) Powell v. Kellick, Bull. N. P. 57. (*d*) Meriton v. Gilbee, 8 Taunt. 159. 2 B. Moore, 48, Martin v. Burton, 1 Brod. and Bing. 279. See Staniford v. Sinclair, 2 Bing. 193. (*e*) Turner v. Lee, Cro. Car. 471. Renvin v. Watkins, Selw. N. P. edition 4, p. 645.

on a lease for years of her freehold estate, except in the case of a lease made by himself, and which has not been defeated by the entry of the wife's heir (*a*).

But if the wife's term be demised for years, the reversion as well as the right to the arrears is vested in the husband after her death; and it seems, therefore, that he may distrain, on the same principle which gives to the executor of tenant for years the power of distress for arrears of rent due from an under-lessee (*b*).]

2. We shall now proceed to consider what will and will not be such a reduction by the husband into possession of his wife's *choses in action* recoverable immediately, as will defeat his wife's right to them by survivorship. And,

First.—It is to be ascertained, what acts *in pais* will not be a reduction into possession of the *choses in action* so as to bar the widow of her right to them.

Mere intention to reduce into possession wife's choses in action insufficient.

Upon this subject it is to be observed, that a mere intention to reduce the wife's *choses in action* into possession will be insufficient. The acts to effect that purpose must be such as to change the property in them, or in other words must be something to devest the wife's right, and to make that of the husband absolute; such as a judgment recovered in an action commenced by him alone, or an award of execution upon a judgment recovered by him and his wife, or receipt of the money, or a decree in equity for payment of the money to him, or to be applied for his use (*c*).

Appropriation therefore of a fund insufficient.

A mere *appropriation* therefore of the fund will be insufficient.

Thus in *Blunt* v. *Bestland* (*d*), *A* bequeathed to *B*, the wife of *C*, 600*l*., to be paid by the executrix within twelve months after *A*'s death, and appointed *D* executrix. About a year after *A*'s death, *C* died, having

---

(*a*) Harrison v. Dixon, Vaughan, 45. (*b*) Wade v. Marsh, Latch. 211. (*c*) Pre. Ch. 412, 418. (*d*) 5 Ves. 515.

by will disposed of the legacy of his wife, viz. to his wife *B* for her life, and afterwards *amongst his children;* he then made some trivial provision for his wife. *B*, having two children by her deceased husband, married *E*. *B* and *E* instituted a suit against the executrix of *A* and the executor of *C* (*B*'s first husband) and *B*'s two infant children, claiming the legacy of 600*l*. The executrix of *A* set forth in her answer, which was supported by depositions, that as executrix she became intitled to 600*l*. secured to the testatrix, her executors, &c. upon a mortgage of the freehold estates of *Wissendine*, in the county of *Rutland*, belonging to her, the defendant's mother; and that the defendant, considering herself liable to pay *C* (*B*'s first husband) the legacy of 600*l*., had some conversation with *C* in relation thereto a short time after the expiration of twelve months from the testatrix's death, and the defendant intimated her willingness to pay him the legacy, but she, not being then prepared with the money, told him that it should be discharged out of what was due upon the mortgage, and that she would call in the money for the purpose if he pleased; to which *C* replied, that he was not at that time in want of the money, but had rather it should remain in its then situation, he receiving the interest. The defendant accordingly *paid him the interest* as it became due, taking receipts thus expressed: "Received of *D*, the executrix of *A*, the sum of 12*l*. for half a year's interest of 600*l*., left to my wife by *A*'s will, as charged upon the estate at *Wissendine* in *Rutland*." The principal question was, whether the above transactions between the executrix of *A* and the first husband of *B* amounted to such a reduction of the legacy into his possession as the law requires for the purpose of making it his own property, or whether it survived to his widow, the then wife of *E*? And the Court declared that what was done by the executrix amounted to no more than an *appropriation* of so much of the testatrix's assets as

were necessary to discharge the legacy, and that a mere appropriation was not sufficient to change the property in a *chose in action* belonging to the wife, which could not be recovered except through the medium of a suit in equity, to which she must have been a party.

[Where a *feme sole* was intitled to a sum of money charged on her brother's estate, who, in a settlement made on the occasion of her marriage, covenanted to pay it to her husband, and the husband received the interest, but died without having got in the principal, it was held to vest in the wife by survivorship (*a*).]

And the husband will not be intitled to stock transferred into her name during, and which accrued to her after the marriage.

The transfer of stock into the wife's name, to which she became intitled during the marriage, will not be considered as a payment or transfer to her husband so as to defeat her right by survivorship.

Accordingly, Mrs. *Wildman*, then under coverture, became intitled to a distributive share of personal estate as one of the next of kin of *A*, part of which consisted of 3 *per cent.* stock. The administrator transferred her share into her name, describing her as the wife of *John Wildman*, and so it stood at her husband's death, except that she had sold and transferred some part of it with the assent of her husband, signified by his signing his name to each transfer. The question was, whether the remaining stock constituted part of the husband's estate, or belonged to his wife by survivorship? The Court held, that as the husband exercised no act of dominion over the fund, and did nothing to reduce it into possession either by transfer into his name or otherwise, and since all his acts were of a contrary tendency and evinced his concurrence in her being sole owner of the stock, such stock belonged to the wife as surviving her husband (*b*).

(*a*) Howman v. Corrie, 2 Vern. 190. (*b*) Wildman v. Wildman, 9 Ves. 174.

Upon the principle of the last case, that of *Nash* v. *Nash* (*a*) was decided. There the father of *A*, a married woman, drew a check on his bankers in her favour for 10,000*l*. On the same day she presented it, and instead of money she took from them a *promissory note* payable on demand, which she delivered to *B*, her husband. During *B*'s life all the money secured by the note remained with the bankers, except 1000*l*., which were received by B, and for which he gave his receipt, and he received the interest on the remaining sum of 9000*l*. up to his death. *A* having survived her husband, claimed that sum as not having been received by him during his life. And so it was determined by *Sir Thomas Plumer*, V. C.; because the note was a *chose in action* of the wife, which upon her husband's death survived to her; and he observed, that if immediately after the check had been given the husband had died, since it gave no legal right to sue the bankers if they had refused payment, the father alone could have recovered against them; that the note given to the wife in lieu of the check gave a right to recover the sum, but that it was merely *in action*, and not like money or a chattel; and that the receipt by the husband of the 1000*l*., and of interest upon the remainder, was not a reduction into possession of such remainder, as such receipt did not alter the nature of the note, it still continuing a *chose in action*, a security for the remaining sum of 9000*l*. (*b*).

(*a*) 2 Madd. 133.

(*b*) In this case the distinction between negotiable instruments, which are assignable at law, and other choses in action, was not adverted to. See on this point M'Neilage v. Holloway, 1 Barn. and Ald. 218, cited post, and Barlow v. Bishop, 1 East, 432, where it was said by Lord Kenyon, that the gift of a promissory note to the wife vested it in her husband. It was held in Hodges v. Beverley, Bunb. 188, and by Lord Hardwicke in Lightbourne v. Holyday, 2 Eq. Ca. Ab. 1. 2 Madd. 135 *n*. that a promissory note given to the wife did not survive to her.

So also where money was left in the hands of trustees for the benefit of the wife, and her husband died, she was declared to be intitled to it by survivorship, her husband having made no disposition of it during his life (*a*). The subject—

Secondly, proposed to be considered was, the effect of actions at law and suits in equity to vest absolutely in the husband his wife's *choses in action*.

If the wife be named in the action, and the husband die after judgment and before execution, the wife is intitled to a *scire facias*. Otherwise, if the action is brought by the husband alone.

The naming or not naming the wife in an action is attended with material consequences in relation to the present subject; for if she be a party, and the husband die after judgment, and before execution sued out, the judgment will survive to her, and she will be intitled to a *scire facias* upon such judgment. But if the action be brought by the husband alone, and he die after judgment, his representatives, and not the wife, will be intitled to the benefit of it (*b*). And if, *previously* to the marriage, the wife had obtained a judgment, and afterwards she and her husband sued out a *scire facias*, and had an award of execution, and the wife died before the writ was executed, the property would be changed by the award, and belong to the husband as the survivor (*c*).

The husband may sue alone, on a right of action arising to the wife during coverture.

The effects of these different methods of proceeding at law by the husband being such as above mentioned, it may be useful to consider when he may or may not sue without making his wife a party.

It may be considered as a general rule, that the hus-

If a bond be given to the wife during the coverture, and the husband does not reduce it into possession, it seems that it will survive to her. Coppin v. ————, 2 P. W. 497. Day v. Padrone, 2 M. and S. 396 *n.*, and see Wildman v. Wildman, cited ante. *Contra.* Lightbourne v. Holyday, *ub. sup.*

(*a*) Twisden v. Wise, 1 Vern. 161. (*b*) Oglander v. Baston, 1 Vern. 396. 2 Ves. sen. 677. 12 Mod. 346. 3 Lev. 403. Noy, 70. Costs ordered by rule of Court to be paid to the husband and wife, were held to survive to her. Tilt v. Bartlett, Hanmer, 104.

(*c*) 1 Salk. 116.

band may commence proceedings at law in his *own name only*, for all the personal estate in action which accrued to his wife, or to her and him jointly, *during* the marriage, and in respect of all personal contracts or covenants made or entered into with them during that period (*a*); because the right of action accrued *after* marriage, and the husband might disagree to his wife's interest, and make his own absolute; an intention to do which he manifests in bringing an action in his own name, when it might have been commenced in the names of both of them.

Thus, if a bond be given to husband and wife, he alone may bring an action of debt for recovery of the money due upon it (*b*). And if they demise for years the wife's estate, reserving a rent, the husband alone may commence an action for the recovery of the arrears (*c*).

When the husband and wife may sue jointly on a right of action arising during coverture

[In actions arising from contract subsequently to the marriage, where the promise is made to the wife alone, or to the husband and wife, and where the consideration moves wholly or in part from the wife, or where she is (as it has been expressed) the meritorious cause of action (*d*), the husband may assent to give her an interest in the contract, and join her with him in the action. Thus they may join in action on covenants concerning her lands (*e*), and on bonds or notes given to her during the coverture, as such instruments imply

---

(*a*) Hilliard v. Hambridge, Aleyn, 36. Owen 82. 2 Mod. 217. 1 Stra. 230. Cro. Jac. 399. Ankerstein v. Clarke, 4 Term Rep. 616. Philliskirk v. Pluckwell, 2 Maule and Selw. 393.

(*b*) Coppin v. ———, Day v. Padrone, Lightbourne v. Holyday, cited above. The same point was decided in Howell v. Maine, 3 Lev. 403; where the bond was given during the coverture, see 2 M. and S. 396. (*c*) Beaver v. Lane, 2 Mod. 217. 1 Roll. Rep. 52. (*d*) Rose v. Bowler, 1 H. B. 108. See 2 Wils. 424. (*e*) Aleberry v. Walby, 1 Str. 229. Dunston v. Burwell, 1 Wils. 224.

a consideration moving from her (*a*). So they may join where the contract is in consideration of her services (*b*), but not unless the promise is made to her (*c*). But they cannot (as it seems) join where the consideration is money paid by her, as the money must belong to the husband alone (*d*). And the husband and wife cannot join in an action upon a promise made to them jointly, without showing her interest in the consideration (*e*).]

But for the recovery of debts due to the wife prior to the marriage she must be joined, except on negotiable securities.

But for such debts, &c. as were due to the wife *before* the marriage, and continue unaltered, since the husband cannot disagree to her interest in, and he has only a qualified right to them, viz. by reducing them into possession during her life, he is unable to maintain an action for such property without making his wife a party (*f*).

[To this rule an exception has been made in the case of a bill of exchange, or promissory note, payable to the wife *dum sola* (*g*). Such instruments being transferable at law, are considered to bear more resemblance to chattels personal, than to other choses in action. The wife after the marriage is unable to indorse them; but the husband might pass them by indorsement (*h*), and thus give to his assignee the right of suing on them in his own name, and he is therefore held to have the same right himself.]

(*a*) 1 Philliskirk v. Pluckwell, 2 M. and S. 393. See p. 396. (*b*) Brashford v. Buckingham, Cro. Jac. 77, 205. Fountain v. Smith, 1 Sid. 128. Holmes v. Wood, 1 Barnard. 75, 249, cited 2 Wils. 424. (*c*) Buckley v. Collier, 1 Salk. 114. Carth. 251. King v. Basingham, 8 Mod. 199. (*d*) Abbot v. Blofield, Cro. Jac. 644. 2 Roll. Rep. 237, 250. *Contra*, Pratt v. Taylor, Cro. Eliz. 61. (*e*) Bidgood v. Way, 2 Bl. Rep. 1236. See 3 East, 106. (*f*) Hardy v Robinson, 1 Keb. 440. Tirell v. Bennett, 2 Keb. 89. Noy, 70. Milner v. Milnes, 3 Term Rep. 627. Rumsey v. George, 1 Maule and Selw. 176. (*g*) M'Neilage v. Holloway, 1 Barn. and 'Ald. 218. Exparte Barber, 1 Glyn. and Jameson, 1. (*h*) See Barlow v. Bishop, 1 East, 432.

If, however, the contract, or nature of the demand, be altered *after* the marriage, as by taking a new security; in that event, as it appeared in the last section, the husband may sue alone (*a*).

When the wife must be joined in actions relating to her freehold.

In all cases when the wife's *freehold* is to be recovered, she must join with her husband in the proceedings, as in instances of disseisin (*b*), or of injuries done to the inheritance, as by pulling down houses, &c. or where an action of covenant is necessary to compel farther assurance upon a conveyance to husband and wife (*c*).

But when the title does not come in question, and the action is merely personal, and seeks a compensation in *damages* for an injury done to the husband's interest in his wife's estate during the marriage, then it is in his election whether he will join his wife in the action or not. Thus he alone can maintain an action of covenant against a lessee of his wife's estate for not repairing it (*d*).

Yet if the husband be possessed of a rectory for years in the right of his wife, or jointly with her, he may join her name with his in an action of debt for the treble value of tithes not set out; for, although the tithes be personal chattels, the act of the 2d of Edward the sixth, chap. 13, upon which the action is founded, gives it to the proprietor or fermor, &c. so that the wife being fermor, she is a proper party to the action (*e*).

[If the husband alone proves the wife's debt under a commission of bankrupt against the debtor, it seems that her right by survivorship is not defeated (*f*).]

I shall now advert to the effect of decrees in equity

(*a*) *Ante*, p. 189. (*b*) 1 Bulst. 21. (*c*) Middlemore v. Goodale, Cro. Car. 505. (*d*) Bret v. Cumberland, Cro. Jac. 399. 1 Roll. Rep. 359. S. C. Costrell v. Moor, Het. 143. 2 Bulst. 14. Tregmiel v. Reeve, Cro. Car. 437. (*e*) Beadles v. Sherman, Cro. Eliz. 613. (*f*) Anon. 2 Vern. 707.

to change the wife's property in her personal estate, and to intercept her right of survivorship.

A joint decree in equity survives to the wife.

Decrees so far resemble judgments at law in this respect, that until the money be ordered to be paid, or declared to belong, to the husband, the wife's rights will remain undisturbed; and as a joint judgment will survive to the wife if her husband die before execution is awarded, so will a joint decree until an order be obtained for payment, or declaring the money to belong, to the husband (*a*).

Thus in *Nanney* v. *Martin* (*b*), there was a decree in a joint suit by husband and wife, for money which he claimed in her right. The husband having died before further proceedings, the wife, as in the instance of a joint judgment, was declared intitled to the benefit of the decree.

In *Packer* v. *Wnydham* (*c*), a sufficient part of 5500*l.* belonging to the wife was decreed to be applied in exonerating her husband's estate from debts, and the remainder of the sum to be settled on him, her, and children, as therein mentioned; and upon the husband's concurring in such settlement, he was to have the residue of her fortune. The 5500*l.* were paid into Court; but the husband never having made the settlement directed, the money was laid out by the Court; and the wife surviving her husband, it was decided, as to the sum of 5500*l.*, that it having been paid into Court during the marriage, the property in it became vested in the husband, and belonged to the persons claiming under him. In this case, it is to be observed, that the money was *ordered* to be applied for the husband's sole use; which was equivalent to a judgment in his favour; so that from the time of the decree the exclusive right of the husband was established; the con-

---

(*a*) 10 Ves. 91. (*b*) 1 Eq. Ca. Abr. 68. Also 3 Atk. 726, S. P.
(*c*) Pre. Ch. 412.

dition as to making the settlement affecting only his title to the residue of his wife's fortune.

A mere order for husband to make proposals for a settlement will not affect wife's right by survivorship.

In *Phipps* v. *The Earl of Anglesea* (*a*), the decree was merely that the fund should be secured for the wife and her issue until a settlement was made. This order was held not to change the property so as to prejudice her title by survivorship. There was no declaration that the fund should be the husband's.

In *Bond* v. *Simmons* (*b*), there was no decree pronounced altering the interests of the husband and wife. The order was a mere reference to the master to receive from the husband proposals for a settlement, which the husband declining to make, the executor defendant, at his own request, was permitted to pay the wife's money into Court, which by order was directed to be laid out in South Sea annuities for the *benefit of husband and wife*, subject to further directions. *Lord Hardwicke*, therefore, decided that the wife, having survived her husband, was intitled to the fund.

The same principle applies to the case of *Forbes* v. *Phipps* (*c*). The decree was, that one sixth share of a residue, to which the wife was intitled, should be paid *to her and her husband*. The wife died before the money was received, and her husband being the *survivor*, it was determined that he was intitled to it. This decision was authorised under the joint decree, which was the same as a joint judgment. As the survivor, therefore, the husband took the money under the decree, and not as his wife's administrator, so as to render the fund liable in his hands to her debts.

And in *Macauley* v. *Phillips* (*d*) no decree was made altering the rights of the husband and wife, but the last order was for the husband to make proposals for

---

(*a*) MSS. 22 Nov. 1738. (*b*) 3 Atk 20. (*c*) 1 Eden's Rep. 502. See also Hore v. Woulfe, 2 Ball and B. 424. (*d*) 4 Ves. Jun. 15. 10 Ves. 91.

a settlement, which he omitted to do: the husband died, leaving his wife surviving him, who, it was determined, became solely intitled to the residue of the property.

But if the settlement were approved by order of Court, confirming the Master's report, it would seem that such order, according to the terms of the reference, would change the property, and intitle the husband's representatives to it, although he did not live to receive it (*a*).

[An order for a payment of a sum of money to the husband, in right of his wife, changes the property, and vests it in him, freed from the wife's right by survivorship (*b*).]

[In a late case (*c*) the husband having assigned a fund in Court belonging to the wife, an order was made, on her examination and consent, that part of it should be paid to the assignee, and that the interest of the remainder should be paid to her for her life for her separate use, with liberty for any persons intitled, to apply at her death. This was held not to affect her right by survivorship; and on her death, having survived her husband, a transfer to her administrator was directed.]

Thirdly. The effect of awards, and of the wife's agreement *in pais pendente lite*, upon her title, when she survives her husband.

In the second section (*d*) it was observed, that an award in favour of the husband in regard to the wife's leasehold interest would alter the property, and vest

---

(*a*) See the case of Macauley v. Phillips, in which the Master of the Rolls inclined to this opinion. See post, chap. 7, sect. 1, and Steinmetz v. Halthin, cited there, as to the question when the husband's right by survivorship will be affected by the equitable right of the wife and children to a provision.

(*b*) Heygate v. Annesley, 3 Bro. C. C. 362. (*c*) Johnson v. Johnson, 1 Jac. and Walk. 472. (*d*) *Supra*, p. 185.

the term in him; and it has been so decided in regard to her other chattels.

Award vests the wife's property in her husband,

Thus in *Oglander* v. *Baston* (*a*), the plaintiff, the widow of *A*, being intitled to the surplus of the personal estate of *B*, as residuary legatee, and a difference arising between her husband *A* and the executor as to the residue's amount, it was referred to arbitration, and an award was made that the executor *should pay* to the husband 1500*l.*; but before any farther proceedings, *A*, the husband, died. The sole question was, whether the wife, or the executor of her husband, should have the money? And it was determined in favour of the husband's executor; because the award was a sort of judgment which, having ordered the 1500*l.* to be paid to the husband, changed the property, and vested it in him.

but, pending a suit in equity, an agreement not approved by the Court will not bind her interest.

Under the protection which a Court of Equity affords to the interests of married women, it will not permit agreements entered into between her, or her friends acting for her, and her husband, *pendente lite*, to be obligatory upon her; so that any arrangement which, pending a suit, may be so made, by which it is agreed that he, upon certain terms, shall have the residue of her property, will not, without the sanction of the Court, bind her: notwithstanding, therefore, such an agreement, if the title of the husband's representatives rest solely upon it, his wife's right by survivorship will take place.

Accordingly, in *Macaulay* v. *Phillips* (*b*), after the suit had been instituted by the husband and wife for her property, a treaty took place between them for settling the former's claims upon it, the husband having been previously ordered by decree to lay proposals before a master for a settlement. After a correspondence had passed between the solicitors of each

---

(*a*) 1 Vern. 396. But see ante, p. 185, note (*e*), and Hunter v. Rice, 15 East, 100. (*b*) 4 Ves. 15.

party, terms were finally settled, but before they were carried into effect the husband died; and the Court decided, that such agreement did not bind the wife, but that, as the survivor, she was intitled to the property; because no act of the Court had altered the interests of the parties, and the arrangement, not having been approved of by the Court, was nugatory.

Fourthly. As to the effect, upon the wife's title by survivorship, of receipt of the money by, or a transfer of the funds to the husband, and also of his release of them.

Husband's receipt of wife's property defeats her right by survivorship,

If the husband receive the money, legacy, or duty, which was owing to his wife, or if he alone, or he and his wife, authorise a person to receive, who actually obtains it, either of those receipts will change the wife's interest in the property, and be a reduction of the chose in action into the possession of her husband, devested of her title to it upon surviving him; and he may maintain an action for the money so received by the person authorised as above (*a*).

In *Doswell* v. *Earle* (*b*), *A*, the wife of *B*, was intitled to 250*l.* under the will of *C*, expectant upon the death of *D*. The executor of *C*, upon *B*'s application, and with his wife's consent, paid the money to *B*, he undertaking to pay to *D* the interest during her life. The wife having survived *D*, who survived her husband, claimed by bill in equity the 250*l.* against her husband's executors; but the bill was dismissed.

except his possession of it be as a trustee or executor.

But the husband's receipt or possession of his wife's *choses in action* must be in the character of husband, in order to defeat his wife's title to them upon surviving him.

Thus, in a case (*c*) where a trustee and executor married one of the residuary legatees named in the will, it was determined that his possession of the tes-

---

(*a*) Roll. Abr. 342, 350. Moor, 452. Golds. 160. (*b*) 12 Ves. 473. (*c*) Baker v. Hall, 12 Ves. 497.

tator's personal estate was to be considered as that of trustee and executor,—he having alone proved; so that his wife's share of the residue could not be sufficiently reduced into possession to prevent its surviving to her upon his death.

Upon the same principle the case of *Wall* v. *Tomlinson* (*a*) was decided. There, certain East India stock, belonging to the wife, was transferred into the names of her husband and another person, until trustees should be appointed, who were to hold the same upon certain trusts for the separate use of the wife, and which had been verbally agreed upon. The wife having survived her husband, the question was, whether the stock belonged to her, or to his legal personal representatives? And *Sir William Grant*, M. R., said, that the transfer of the stock to the husband merely as a *trustee* could not be represented as a reduction into possession which would intitle his representatives, for that it was made *diverso intuitu*.

Semble, transfer of wife's stock into her husband's sole name is a reduction of it into his possession.

But it would seem that a transfer of the wife's stock into her husband's sole name will be a reduction of it into his possession, and defeat her right by survivorship; because such a transfer is equivalent to a receipt of the money by the husband, and an act vesting the sole property in him.

With respect to the releases or acquittances of the husband of his wife's *choses in action* so as to extinguish her right of survivorship, it is to be remarked, that such is the interest which he acquires in her property by the marriage, that he may release debts which were owing to her before its solemnization (*b*); also legacies absolutely given to her (*c*); her interest under the statute of distributions, and the like. Such acts he may do, although he and his wife be divorced *d mensa et thoro;* because the marriage still subsists (*d*).

(*a*) 16 Ves. 413. (*b*) 2 Roll. Abr. 410. (*c*) Gilb. Eq. Rep. 88. 2 Roll. Rep. 134. (*d*) Stephens v. Totty, Noy, 45. Cro. Eliz. 908. See Lewis v. Lee, 3 Barn. and Cress. 291.

Of his acquittance for rent accrued subsequently to arrears then due.

If, then, arrears of rent were permitted to accrue whilst the wife was single, and her husband gave an acquittance for what became due after the marriage, and then died, the discharge would prevent his wife from recovering the arrears which were due at the time of the marriage; because they being a debt owing to the wife at the time of the marriage, the right to receive them was vested in her husband; his receipt, therefore, for rent posterior to those arrears, for which he gave an absolute acquittance, is a discharge of all arrears to the person charged with payment of the rent, not only against the husband but his wife (*a*). Yet, unless the acquittance be under hand and seal, so as to be an *estoppel*, evidence may be given to prove that the prior arrears remain unsatisfied; for it seems that the subsequent acquittance, if not under hand and seal, is merely a *presumptive* bar.

(*a*) Morton v. Hopkins, Dyer, 271. Benl. 186.

CHAPTER VI.

HAVING in the last chapter considered what acts of the husband will, and will not, be a reduction into possession of his wife's *choses in action* which were immediately recoverable; we shall now further consider his power over them, together with his power over such others of his wife's choses in action as are in reversion or expectancy, by his release or assignment. In doing this, it is intended to treat of the subject under the following sections and subdivisions:

I. *The husband's power over his wife's choses in action, by release and assignment, at law and in equity.*
   1. *At law.*
   2. *In equity.*

II. *The effect, upon the wife's title by survivorship, of her husband's assignment, or the law's transfer, of her choses in action which are immediately recoverable, or are in remainder or expectancy.*
   1. *The effect upon the wife's title, as the survivor, of the assignment* TO *assignees in bankruptcy, or under the insolvency of her husband, of her choses in action.*
   2. *The effect of assignments* BY *such assignees upon such title; and of sales of reversionary interests.*
   3. *The effect of assignments by the husband of his wife's choses in action to a* particular *assignee for a valuable consideration; and*
   4. *The effect of the wife's examination and consent, in a Court of Equity, to the assignment.*

I. The husband's power of release and assignment at law and in equity over his wife's *choses in action.*

Independently of actual recovery and receipt of the wife's *choses in action* by her husband, there are other methods by which her title by survivorship may be defeated,—as by the assignment of them by her husband, or his agreement for the purpose, as before noticed (*a*).

1. Then with respect to the wife's personal property, over which her husband has the sole and complete *legal* power of disposition, he may, as it seems, assign it at his pleasure.

Legal assignments.

What interests assignable at law by husband alone.

The interests, amongst others, which are assignable at law, are the personal chattels of the wife in possession, legal terms for years, elegits upon judgments issued before the marriage; and, in analogy to this, he has in equity the same power of assigning terms held in trust for her, and debts or sums of money secured by such terms, decrees made in favour of the wife *dum sola* for money and that she shall hold the premises until satisfaction (*b*).

Wife's mortgage in fee an exception.

But money of the wife secured upon a mortgage in fee is not equally in the husband's power as money secured by a term of years, so that the decisions in regard to the two are different; for a mortgage in fee the husband cannot dispose of at law. The estate, therefore, continuing in the wife, carries to her, surviving, the money along with it (*c*). The security, then, not being assignable without her concurrence, the debt classes among her *choses in action* (*d*); which we will next consider.

[2. The wife's choses in action are debts due to her on bond or otherwise, money in the funds, legacies, trust funds, and other property recoverable by action or suit.

(*a*) *Supra*, p. 178. (*b*) *Vide supra*, chap. 5, sect. 2; also Pre. Ch. 418. 3 P. Will. 200. (*c*) Prec. in Ch. 418. (*d*) 2 Vern. 401.

Wife's choses in action, how far assignable by the husband.

The husband may transfer money in the funds standing in the name of his wife (*a*), and may indorse bills of exchange or promissory notes given to her before or after marriage (*b*). He may also assign a mortgage for a term of years vested in her (*c*). With respect to these descriptions of property, he has, therefore, an absolute power of disposition.

With respect to her equitable choses in action, *i. e.* trust funds, legacies, debts due to trustees for her, and other property which must be sued for in equity, if they be immediately recoverable by suit, the husband may assign them for valuable consideration, and such assignment will be binding on her if she survives (*d*). But if he assign them without valuable consideration, her right by survivorship will continue.]

Accordingly, in *Wright* v. *Rutter* (*e*) which was a fraudulent contrivance of the husband in order to prevent his wife's right by survivorship, he having procured her concurrence to the assignment of her legacy to secure a pretended debt, but in fact in trust for himself; *Lord Alvanley*, M. R., declared, that, excluding the fraud, since the assignment was *without* a valuable consideration, it was void against the wife, and could not defeat her title by *survivorship* (*f*).

[With respect to the legal choses in action of the wife, *i. e.* those of her choses in action which are recoverable at law, the husband has not the power of assigning them at law, with the exception of mortgages for terms of years, and negotiable securities. If the husband assign them, the assignee, standing in his place, may during his life sue for them in the name of the husband and wife. But if the husband die without

---

(*a*) See 3 Ves. 619. 9 Ves. 176. (*b*) *Ante*, 214. (*c*) *Ante*, 177. (*d*) Bates v. Dandy, 2 Atk. 207. Earl of Salisbury v. Newton, 1 Eden, 370. (*e*) 2 Ves. Jun. 673. (*f*) See also Becket v. Becket, 1 Dick. 340. Johnson v. Johnson, 1 Jac. and Walk. 472. Stamper v. Barker, 5 Madd. 157.

having released them, and before the assignee has reduced them into possession, the legal right of action will survive to the wife. If the assignment be without valuable consideration, it seems that it will not be binding upon her equity: and it was said in *Burnett* v. *Kinaston*, according to the report in Prec. in Ch. 118, that the husband's assignment of the wife's bond would not bind her though made for valuable consideration: this however does not appear in the other reports of the same case (*a*). In *Packer* v. *Windham* (*b*), a bond was held to survive to the wife, although the husband had assigned it with other property for payment of a debt; but it may be inferred from the statement of the case that the other property included in the assignment was sufficient to satisfy the debt. It seems, however, that the principle on which a purchaser of the wife's equitable chose in action is intitled as against the wife surviving (*c*), and on which the husband's contract relative to her term of years is enforced against her legal right by survivorship (*d*), must apply equally in favour of a purchaser of her legal choses in action; and consequently, that her husband's assignment of her legal choses in action which are immediately recoverable will in equity be binding upon her.

There is perhaps a distinction in the case of a legal mortgage in fee, vested in the wife. The payment of the mortgage money cannot be compelled without a reconveyance of the legal estate to the mortgagor (*e*), and as this cannot take place without the wife's concurrence, the husband has not the same power over property of this description as he has over the other legal choses in action of his wife. It seems, therefore, to be doubtful whether the husband's assignee for valuable consideration would be intitled to the wife's

---

(*a*) 2 Vern. 401. 2 Freem. 239. (*b*) Prec. in Chan. 412. Gilb. Eq. Rep. 98. (*c*) *Ante*, p. 225. (*d*) *Ante*, p. 177.
(*e*) Schoole v. Sall, 1 Scho. and Lef. 176.

mortgage in fee against her legal right by survivorship. In *Bosvill* v. *Brander* (*a*), the assignees of the husband, who had become bankrupt, were held intitled against the widow, upon the ground that the legal right of action upon the covenant for payment of the money vested (as it was then considered) (*b*) in them. But in the case of an assignment by the act of the husband, the legal right of action on the covenant, as well as the legal estate, survives to the wife. It is to be observed, that in *Bosvill* v. *Brander*, the *Master of the Rolls*, though he considered the assignees intitled to recover the money, doubted whether any equitable assistance would have been given to them against the widow.]

II. The effect, upon the wife's title by survivorship, of the husband's assignment, and of the transfer by law of the wife's choses in action, when they are immediately recoverable, and when they are in reversion or expectancy.

1. In the first section of this chapter it was noticed that the husband might absolutely dispose of all such of his wife's personal estate over which the common law imparted to him the power; and in the same section some particulars of property were described, of which good and effectual *legal* assignments might be made.

Assignees in bankruptcy intitled to all such choses in action against wife's title by survivorship to which they can make-out a right at law.

Of such parts, therefore, of the wife's personal estate, whether in possession or remainder, to which her husband's assignment passes a complete *legal* title, the conveyance will bind his wife although she survive him; and it will make no difference whether the assignees claim under acts of Parliament, or under assignments made by himself for or without value; because by such dispositions the contingent interest of the wife is destroyed, and there is no equity for her against the legal consequences of these transactions, for *æquitas sequitur legem*. And in those instances, although the husband

(*a*) P. W. 458. (*b*) On this point see the next section.

die before his assignees recover the property assigned to them, they will, nevertheless, for the reason last mentioned, have a right to recover and enjoy it against any claim of the widow in respect of her general title by survivorship (*a*).

Not so when the property is merely equitable, for then they take it subject to the equities of the wife.

But when the property of the wife assigned by her husband is not of *legal* cognizance, but merely *equitable*, so that the assignment of it can only be enforced in a Court of Equity; in such and the like cases the assignees of the husband-bankrupt, or his assignees claiming under the insolvent debtor's acts, or his assignees under a deed of trust to pay his debts (*b*), take the property subject to all the wife's equities upon it against her husband (*c*).

This proposition may be now considered as established by the solemn decision of *Sir William Grant*, M. R., in *Mitford* v. *Mitford* (*d*); but previously to it, so strong was the opinion that the effect of assignments by the acts of law would bar the wife's right by survivorship to her choses in action, whether immediately recoverable, or in reversion or expectancy, that the soundness of his Honour's judgment has not been generally considered as unimpeachable. The case of *Mitford* v. *Mitford* was to the following effect:—

A bequeathed 3000*l.* to trustees to place at interest, and to pay such interest to *B* for life or until she married; and upon her death or marriage *A* gave the capital amongst *C* and *D*, and *E* the wife of *M*. equally. *M*, the husband of *E*, became a bankrupt, obtained his certificate aud died, leaving his wife *E* surviving: *B* afterwards married. The question, which was raised

---

(*a*) 2 Ves. Jun. 608—682. (*b*) See Pryor v. Hill, 4 Bro. C. C. 139. 2 Atk. 422. If the trust deed be for payment of creditors, who execute it and release the debtor, it seems to stand on the same footing as any other assignment for valuable consideration. See 11 Ves. 620. (*c*) 2 Dick. 491. 2 Madd. 16. (*d*) 9 Ves. 87.

upon the bill of the surviving trustee, was whether, notwithstanding the bankruptcy, the wife was or was not intitled by right of survivorship to her share of the 3000*l.*, which had been invested in 4 *per cent.* consols? And *Sir William Grant*, M. R., after a review of all the cases, decided in favour of the wife, upon the principle, that this being a chose in action and not reduced into possession during the husband's life, survived to her; and that an assignment under a commission of bankruptcy, although it passed her share, passed it to the assignees *sub modo*, viz. provided they received the share or its value during the marriage, and that the commission or assignment did not of itself necessarily intercept the wife's right of survivorship (*a*).

It is observable in this case, that the subject was solely within the jurisdiction of equity, and that the assignees had no remedy but by means of the Court of Chancery; which Court, in analogy to the rule of law, decreed, that as neither the husband nor his assignees had, during his life, reduced the wife's share into possession by sale or otherwise, it necessarily survived to her upon his death. It is conceived, therefore, that there is no solid reason for disputing the propriety of the decision.

With respect to *Bosvill* v. *Brander* (*b*), one of the cases supposed to militate against the above authority, it is to be observed that *Sir Joseph Jekyll*, M. R., after much discussion and great consideration, at first decided in favour of the wife, and afterwards against her; so that it contains decisions both ways, and shows the unsettled state of that Judge's mind upon this subject. The property was a mortgage in fee belonging to the wife, the title deeds were in the hands of the assignees, and the widow filed a bill for them, and to have the benefit of the mortgage. And the Master of the Rolls seems to

---

(*a*) S. P. Parker v. Dykes, 1 Eq. Ca. Ab. 54. Gayner v. Wilkinson, 2 Dick. 491. 1 Bro. C. C. 50. *n.* (*b*) 1 P. Will. 458.

have considered it a material feature in the case that the suit was *by* and not against the widow (a circumstance at present of no consideration), as afterwards will appear. His Honour admitted the general principle, that the assignees claiming under the husband could not be in a better situation than the husband would have been: the necessary consequence of which one would have supposed to have been a decree, that as the husband's interest was subject to the wife's right of survivorship, so it should be in the hands of his assignees; and that since neither he nor they in his lifetime reduced the debt into possession, it necessarily survived to the wife, according to the first decision. Under such circumstances it is conceived, that this case cannot be fairly adduced to impeach the decision in *Mitford* v. *Mitford*. And as to the case of *Miles* v. *Williams* (*a*), another of those cases, the only point decided was, that the husband's certificate under his bankruptcy, if well pleaded, would have been a bar to an action brought against him and his wife upon a bond given by her before marriage; so that the present question was not there decided. And with respect to *Pringle* v. *Hodgson* (*b*), the last of those cases, *Lord Rosslyn* probably considered *stock*, which stood in the wife's name at the time of the marriage, as *not* being either in the nature of a chose in action, or an *equitable* interest, and that such impression produced the decree in that case against the wife in favour of the assignees. These two latter cases, therefore, do not appear to shake the solidity of the decision in *Mitford* v. *Mitford*, which was a determination upon the wife's reversionary interest (*c*), and the property could not be reduced into possession in

---

(*a*) 1 P. Will. 249. (*b*) 3 Ves. 617. In this case the legal right to the stock had been changed by a transfer from the wife's name to trustees. (*c*) The interest was reversionary at the time of the bankruptcy, but by the marriage of Charlotte Mitford it became a present interest before the husband's death.

the ordinary acceptation of those terms. *Sir William Grant's* observation, that the wife's property being a chose in action and not reduced into possession during the husband's life, survived to his wife, must, it is presumed, be considered in an extensive sense, importing that the assignees having neither reduced the property into their possession (which in this case they had not the opportunity of doing), nor *disposed* of it for value in the lifetime of the husband; since the wife, therefore, would have been intitled to it against the representatives of her husband, she was equally so intitled against his assignees in bankruptcy. This interpretation of the expression of the Master of the Rolls is founded upon what has been before said in regard to the husband's legal power over his wife's personal estate, where it appeared that his assignment of her real chattels, whether in possession or remainder, intercepted at law her title by survivorship (*a*), and that Courts of Equity, acting in analogy to the legal rule, inforced against his wife surviving him his *agreement* to mortgage or assign them (*b*).

If therefore the wife survive and the property be not disposed of, or received by the assignees, her title will prevail.

[With respect to the legal choses in action of the wife, it was the opinion of *Lord Macclesfield*, in *Miles* v. *Williams* (*c*), that the assignment in bankruptcy passed them freed from the wife's right of survivorship, and that the assignees might, under the statute, 1 Jac. 1, c. 25, sue for them in their own name, either before or after the husband's death. This was followed in *Bosvill* v. *Brander* (*d*); but in *Exparte Coysegame* (*e*), *Lord Hardwicke* thought that the statute only gave the assignees such right of action as the bankrupt might have had. The cases of *Miles* v. *Williams* and *Bosvill* v. *Brander* were reviewed in *Mitford* v. *Mitford*, and the judgment in the latter case applies in principle to legal as well as to equitable debts. It seems therefore

---

(*a*) Chap. 5, sect. 2. (*b*) *Supra*, p. 177. (*c*) 1 P. W. 255. 10 Mod. 160—243. (*d*) 1 P. W. 458. (*e*) 1 Atk. 192.

that the legal choses in action of the wife (with the exception of those over which the husband has an absolute power of alienation) (*a*), will survive to the wife, as against the husband's assignees in bankruptcy, unless reduced into possession in his lifetime.].

And *semble* that assignees may dispose of the choses, &c. for value, and bar wife's right by survivorship.

2. If, then, Courts of Equity pursue the legal analogy, it seems to follow, that, since the husband is enabled at law to *release* his wife's choses in action, in which he has an *immediate* interest (*b*), or an interest expectant upon an event which may by possibility happen during the marriage (*c*), that class of his assignees before described will have a right to dispose of such choses in action for value, if the disposition be made during the coverture, and that it will defeat the wife's title by survivorship (*d*).

The supposed rule that sales of reversionary interests are invalid, unless the full value be given, considered.

But it must be noticed that sales of *reversionary* interests are almost rendered impracticable, from an understanding that dispositions of them by private contract will in general be set aside for the least inadequacy of price, and that proof of the full value lies upon the purchaser, *i. e.* he must prove that fact, without the vendor being required to show the contrary. This, however, seems to be a mistake; for all, or the great majority of the cases, merely establish this doctrine in instances of *expectant* heirs, or of persons who may be considered to be adopted as such from their relation to the family (*e*).

The principle is public policy, in order to prevent deception upon parents and ancestors, no parties to the transactions; and who, in ignorance of them, are induced to leave their properties to be divided among usurers and common adventurers, instead of their heirs, whom they intended to be beneficial inheritors and successors

---

(*a*) *Ante*, p. 225. (*b*) Touchst. 333. 2 Roll. Abr. 410, pl. 50. (*c*) 2 Roll. Rep. 134. Gilb. Eq. Rep. 88. 1 Salk. 327. (*d*) 2 P. Will. 608. 9 Mod. 102. (*e*) 9 Ves. 246. 16 Ves. 512. 17 Ves. 29. 3 Ves. and Bea. 117.

to their fortunes. But this exception of expectant heirs out of ordinary cases appears to have been opposed by some learned judges; and I think that it will be found, upon examining the authorities prior to *Peacock and Evans*, after referred to, that, whatever might have been the *dicta* of judges, the cases were decided not upon inadequacy of value only, but upon gross frauds and impositions, which ought, and would have set aside any contracts (*a*). In *Curwin* v. *Miller* (*b*) *Lord King* relieved the heir. That case is very shortly reported, and may have omitted to state many particulars. In *Chesterfield* v. *Janson* (*c*), which was decided upon the subsequent confirmation of the original transaction, *Burnet* J. said, it might be too rigid to say that an heir should not borrow upon an expectancy, as some persons are so niggardly and sparing to their children, that a poor heir might starve in the *Desert* with the land of *Canaan* in his view, if he could not relieve himself by borrowing upon an expectancy; but as modern authorities (*d*) have established that although an expectant heir may mortgage or sell his expectancy, yet if the full value be not obtained the transaction shall be void, the consequence of this rule is to exclude the fair and honest purchaser, who will not run such a risk, and to admit the usurer, and rapacious money-lender, who will incur it, but only upon the most exorbitant terms; so that the severity and *uncertainty* of the rule defeats its own end. Probably, the more effectual principle would have been, to have established the contract of the heir in all cases where it would have been

---

(*a*) Nott v. Hill, and Bill v. Price, 1 Vern. 167, 467. Barney v. Tyson, 2 Ventr. 359. Ardglasse v. Muschamp, 1 Vern. 237. Lamplugh v. Smith, 2 Vern. 77. Berny v. Pitt, 2 Vern. 14, and Twisleton v. Griffith, 1 P. Will. 310. (*b*) 3 P. Will. 292, note. (*c*) 1 Atk. 301. (*d*) Evans v. Chesshire, Belt's Supp. to Ves. Sen. 300. Peacock and Evans, 16 Ves. 512. Gowland v. De Faria, 17 Ves. Jun. 20. Bowes v. Heapes, 3 Ves. and Bea. 117.

binding upon other persons, and to have relieved him when and when only *undue* advantage had been taken of his necessities, and a gross unconscionable bargain had been made with him. In *Hill* v. *Caillovel* (*a*), which was the case of a son aged twenty-four, who gave his bond for the payment of 520*l.* within six months after the death of his father, then of the age of seventy, *Lord Hardwicke* observed that the circumstances were *suspicious*, but intimated that he could not relieve against the transaction *without proof* of *imposition*. Great inconvenience in practice, and much litigation, have arisen from the law being established as above; and it is considered impossible to recommend a purchaser to accept a title that depends upon so uncertain a calculation as the price being the full value of the reversion, which is left to the opinion of a judge in each particular case, and upon which it may frequently happen that any two or more persons may disagree; so that at present *Burnet*'s observation is realised, that the expectant heir must either starve in the sight of *Canaan*, or fall into the hands of rapacious money-lenders, except the Court should relax the rule in the instances after mentioned of sales by public auction, although not so productive as *bonâ fide* sales by private contract. The inconvenience felt in this instance, from the uncertainty of the law as applicable to each case, shows the propriety of all the rules of law being made clear, and followed in all cases to which they apply, until an alteration be made with the concurrence of all or the majority of the proper Judges. Experience has proved the truth of the proposition, that *misera servitus est ubi lex est vaga*; and it has been ascertained by the same unerring test that there is less inconvenience in acting upon an unsatisfactory principle which has acquired the force of law by decisions, than when the private opinion or views of a single Judge have induced him to set at nought the

---

(*a*) 1 Ves. Sen. 122.

determinations of his predecessors and the opinions of his cotemporaries, and to decide against them.

The above rule is confined to the case of expectant heirs and persons standing in that relation.

It is presumed that the cases do not extend to instances where the persons intitled to remainders or reversions are not the expectant heirs, or, from their relation to the family, are not to be considered in the same character.

Thus in the case of *Gwynne* v. *Heaton* (*a*), *Lord Thurlow* said, that "a remainder-man might sell or give away his remainder, and the Court will not take it away from the purchaser or donee; that an inadequate consideration is *not alone* sufficient to vitiate the contract, although in order to do so it must be inadequate. Where it is sold for a sum *grossly* inadequate, the Court has never suffered it to stand."

In *Batty* v. *Lloyd* (*b*), the defendant agreed with the plaintiff, intitled to an estate after the death of two old women, to give to her 350*l.*, in consideration of being paid 700*l.* at the deaths of these two old women; and the plaintiff was to secure the 700*l.* upon a mortgage of her *reversionary* estate. The women died two years afterwards, and the suit was instituted to be relieved against the bargain; but the Court refused to interfere, observing that nothing ill appeared in the transaction.

And in *Cole* v. *Gibbons* (*c*), *Lord Talbot* took the distinction between young heirs and other persons.

The conclusion to be drawn from the old and new cases seems to be this:—that the heir may sell or incumber his reversionary or expectant property by private contract, if the sale be for the full value, or if the incumbrance be made upon fair terms.

And probably it may be considered, that a stranger may sell his remainder or reversion for the best price which he can get, although it may be at an undervalue,

---

(*a*) 1 Bro. C. C. 6. (*b*) 1 Vern. 141. (*c*) 3 P. Will. 294.

if there be no fraud or imposition. I have used the word, "probably," in consequence of the general impression that the reversionary interests of no persons can be sold by private contract, except at their utmost value. There are indeed numerous *dicta* in support of that impression, but I find no case distinctly determined to that effect. The instance of an expectant heir was the first exception to a person's power of free disposition of his property upon the principle before stated. That principle was next extended to the more immediate members of the family, under the supposition, as it is conceived, of the reversionary interest being intended as a portion or provision, and therefore within the principle of the expectant heir. Thus far the cases have advanced, and, as I believe, no farther. When, therefore, the inconvenience of the exception which has been established is considered, and its insufficiency to answer the end of its formation, and the general sentiment in disfavour of it, it may not be considered as too speculative or rash to suppose, that when the question comes fairly before the Court upon the validity of the sale of a reversionary interest belonging to a stranger, the contract will not be vitiated from mere inadequacy of consideration alone, and which would not avoid it in general instances. It appears before, that there is no want of authority for such a determination: the *dictum* of *Lord Thurlow* and the decrees of *Lord Hardwicke* and *North*, Lord Keeper, may be considered a sufficient foundation upon which to build such a decree.

The cases have not proceeded to the length of avoiding sales by expectant heirs of their reversionary interests by *public auction*. Perhaps the money arising from such sales, and upon fair competition, would be considered the value of the property, and bind the heir; since it might reasonably be presumed in such transactions, and in the absence of proof to the contrary, that there was no imposition, no undue advantage taken of

his necessities, and therefore that such sales did not fall within the modern authorities before referred to.

Considering that a married woman is under the special protection of a Court of Equity in respect of her equitable property; in sales, therefore, of her reversionary interests by the husband or his assignees in bankruptcy, &c. it may be thought the most eligible method to do so by public auction (*a*) (*b*).

(*a*) Since writing the above observations I have been favoured with the manuscript of a case preparing for the press by Mr. Maddock, in which a sale by public auction of a reversionary interest by an expectant heir was established by the present Vice Chancellor. The case was Shelley v. Nash *. The plaintiff was intitled to the reversion of 8000*l.* sterling upon the death of the survivor of his father and grandfather; the former of the age of sixty, and the latter of eighty or near ninety, the plaintiff being twenty-two. The plaintiff advertised his reversion to be sold by public auction in March, 1814, at which time the sale took place, and the defendants were declared the highest bidders at the sum of 2593*l.* 10*s.* The grandfather died in January, 1815. The object of the bill was, that the heir should be relieved against the sale. Morgan, the actuary, deposed that at the time of the sale the reversion was worth 3540*l.*, and that 5860*l.* only ought to have been secured to be paid upon the happening of the contingency, in consideration of the sum of 2593*l.* 10*s.* Frend, another actuary, was of opinion that 3653*l.* was the fair price of the contingency, but said that in and since July, 1814, a great change had taken place in the value of money, and that he considered 2561*l.* 10*s.* in and since that month to be the value of the reversion of 8000*l.*; and that had he been asked in the above month what might be expected for the advance of 2593*l.* 10*s.* he should have replied 8099*l.*; and he observed, that in contracts of the like nature, the *contingency of a lawsuit* must

---

(*b*) On the subject of transactions relating to reversionary interests see Davis v. Duke of Marlborough, 2 Swan. 108, and Mr. Swanston's note, p. 139.

Notwithstanding the case of Shelley v. Nash, sales by auction of reversionary interests will not in all cases be supported. In Fox v. Wright, 6 Madd. 111, affirmed by the Lord Chancellor on appeal, the Court interfered by injunction against a post obit bond, which had been sold by auction.

* 28th May, 1818. Since reported, 3 Madd. 232.

If, then, such assignees are able, by their assignment for value, to bar the wife's title by survivorship to her own reversionary choses in action, for the reasons before given, it follows that—

Assignment by husband of his wife's reversionary choses in action for value.

3. An assignee of the husband, for a valuable consideration of the wife's choses in action, whether they be immediately recoverable (*a*), or be in remainder, or expectant upon an event which may possibly happen during the marriage, will also be intitled to hold them against the wife's claim by survivorship.

The reader must consider the power of the husband, to assign for value his wife's reversionary choses in action, as a point not yet finally settled. The opinions of most of the modern equity Judges have been doubtful upon the subject: but I am not aware of any judicial opinion or decision, that the assignee could not retain his purchase against the wife's title by survivorship, except the determination of the present Master of the Rolls, in the case after stated; and a *dictum* of *Sir William Grant*, M. R., that a husband can dispose of his wife's property in expectancy against every one but his wife surviving him (*b*). On the contrary side of the question stand the names of *Lords Hardwicke*, *King*, and *Alvanley;* as will appear from the remarks which will be made upon the decision of *Sir Thomas Plumer*, in *Hornsby* v. *Lee* (*c*).

The case of *Hornsby* v. *Lee* considered.

In that case the wife was intitled to certain trust-stock

---

be taken into consideration. His Honour decided in favour of the bargain, and dismissed the bill *with costs*, observing, that the principle of the rule laid down by the modern cases could not be applied to sales of reversions by *auction;* that sales by auction was *evidence* of the market price; and *pretended* sale by auction to cover *private* bargains would operate nothing.—*Note by the Author.*

(*a*) A form of assignment is given in Appendix, No. 6, Vol. ii. (*b*) 1 Ves. and Bea. 405. (*c*) 2 Madd 16. In a recent case, not yet reported, a similar decision was pronounced by Sir Thomas Plumer, upon full consideration. See some remarks on this point in the Addenda at the end of Vol. ii.

upon the death of her mother; and she and her husband assigned it to secure an annuity granted by him. The husband took the benefit of the insolvent debtors acts, and a general assignment of his property was made. The mother then died, and afterwards the husband, without any act having been done by him or his assignees during the mother's life (*a*) to reduce the fund into possession. The question was, between the wife, *the grantee of the annuity*, and the assignee under the insolvent debtors acts: and *Sir Thomas Plumer* decreed the trust fund to the wife against the annuitant, because the assignment (although made for *value* to a *particular* assignee) did not bind the wife's right of survivorship. And he decided against the assignee under the insolvent debtors acts, because the assignment had no greater effect than that in bankruptcy, which has been before considered.

Sir Thomas Plumer's decree against the annuitant is, I believe, the first decision that the *reversionary* interests of the wife in choses in action cannot be assigned by her husband, even for value, so as to bar her title by survivorship. This judgment, then, purporting to settle a new point of equity, the reader will reasonably expect that it should not be passed over in silence, especially when so much doubt had previously been entertained upon the subject. His Honour's decision against the annuitant was made upon the principle, that a *particular* assignee of the husband cannot be in a better situation than his assignees under a general assignment in bankruptcy. But, with all due respect to so high an authority, it is conceived, that it will be difficult to apply that principle to the two cases: for assignees in bankruptcy are merely placed in the situation of the husband by the assignment, under the directions of the statutes, with his rights and powers; but his assignee for a valuable consideration

(*a*) See 2 Dick. 491.

claims under the *execution* of his legal power; the latter assignee, therefore, is not in the same situation as general assignees in bankruptcy, but his case resembles that of the assignee for value of such general assignees: hence, if the husband's assignee for value have a good title in equity against the wife, it follows that the assignee claiming under the husband's assignees in bankruptcy must have a similar title. The simple question appears to be, has the husband a power to assign, for a valuable consideration, his wife's choses in action, so as to bind her, surviving him? In attempting to answer this question, it is necessary to consider the husband's power at the common law, over this species of property, and his power over it in equity.

With respect to his power at law, it was asked in *Hornsby* v. *Lee*, if a deed assigning a reversionary interest was a reduction of it into possession? The answer must be, surely not; it is not an actual receipt of the thing itself, although it certainly is of its *value*.

But there are other methods by law besides *actual* reduction into possession, by which the husband is allowed to exercise his legal right over his wife's choses in action, and to defeat her title by survivorship, viz. the disposition of her *interest* in such of them as are *legally* transferrible, by *assignment*, without any distinction whether the interest be immediate or in remainder (*a*); and the passing or extinguishment of her *interest* in such of them as are not assignable, by his *release*. The husband's power to assign at law his wife's terms for years, whether in possession or in remainder, and his power to do the same by contract in equity, in analogy to his legal right, has been before shown (*b*); but his power of releasing his wife's choses in action, whether her interest in them be immediate or in expectancy, has not been regularly detailed.

The interest acquired by the husband, upon his

(*a*) See *infra*, chap. 5, sect. 2, pl. 3. (*b*) See last reference.

marriage, in the debts due to his wife, enables him to release them so as to bind her (*a*).

So also he may release all rights accruing to her during the marriage (*b*).

Husband's power to release them.

That the husband may release his wife's legacy, although she die before the arrival of the time of payment, appears from an *anonymous* case in *Rolle's* Reports (*c*). It seems that the husband was the survivor; but the observation of the Court may be considered as a general one, and to be equally applicable if she had survived him. The Court said, "the husband has an *interest* in the legacy *before* the time of payment accrues, which *interest* it is *clear* that he might have released previously to the period of the money becoming payable." A similar interest he has in his wife's choses in action, in remainder or expectancy, which may *possibly* fall in during the marriage; and there appears to be no solid reason why they also should not be within his power of releasing. Accordingly, in *Gage* v. *Acton* (*d*), *Holt*, Ch. J. expressed himself to the following effect:— "that when the wife has *any* right or duty which by *possibility* may happen to accrue during the marriage, the husband may by *release* discharge it; but where she has a right or duty which by *no* possibility can accrue to her during the coverture, there the husband cannot release it."

Exception when the property is so limited to the wife as it cannot possibly fall into possession during the marriage.

The exception to the husband's power proves the existence of it at law in other instances; and the following are examples of the exception:—

If a lease were made to the husband and wife for their lives, and to the *executors* of the *survivor*; the husband could not release or dispose of the remainder, against the title of his wife surviving him, because it could not possibly come into possession during the

---

(*a*) 2 Roll. Abr. 410. and see 10 Rep. 51 *b*. 1 Ld. Raym. 515, S. C.

(*b*) Touchst. 333.

(*c*) 2 Roll. 134; 1 Com. Rep. 67.

(*d*) 1 Salk. 327.

marriage, and the wife's interest or chance was a mere possibility (*a*). Again,

Suppose a person undertook to pay or bequeath to *B* 100*l.*, if *B* survived *C*, her husband, or if a bond had been given to the wife *dum sola* to the like effect, the release or assignment of *C*, or his marriage with *B*, would not affect *B*'s right to the money upon surviving her husband (*b*). But if the wife had been possessed or intitled to the residue of a term for years, upon the determination of an interest for years carved out of it; or if the 100*l.* had been payable to the wife upon an event which might have happened during the marriage, her husband might have assigned and released them at law.

Such being the husband's power over his wife's choses in action, in remainder or expectancy, as given to him by the law, the next inquiry is, will Courts of Equity pursue the *legal* analogy in relation to equitable assignments by him of her reversionary choses in action, as we have seen that they have done in instances of his agreements to dispose of or pledge them when the wife's interest was immediate or present (*c*)? This can only be determined, upon consideration of what a Court of Equity has done, and the opinions of its Judges; but before I proceed, I shall submit this remark to the reader, whether there be any reason suggesting itself to his mind, why the Court should act in analogy to law, where the husband's contract is to dispose of his wife's choses in action when her interest is immediate; and then to stop short and not pursue the analogy, and hold the same language where the agreement is to dispose of her reversionary interest which may fall into possession during the coverture. We

Semble that husband's assignment for value will defeat such his wife's title.

(*a*) 2 Roll. Abr. 48. 10 Rep. 51. Touchst. 344. (*b*) Belcher v. Hudson, Cro. Jac. 222; and Gage v. Acton, 1 Salk. 326. Hob. 216. Cro. Jac. 571. (*c*) See *supra*, chap. 5, p. 178, et seq.

shall first begin with the *opinions* which have been expressed upon the subject.

In the *Duke of Chandos* v. *Talbot* (*a*), *Lord King* expressed himself thus, "It has been determined that the *possibility* of a term, (viz. where a term was devised to *A* for life, remainder to *B* for the residue of it) might be assigned even by the husband *alone*, as appears from the case of *Theobald* v. *Duffoy* (*b*); a decree by *Lord Macclesfield*, which was afterwards confirmed by the then present Chancellor, and finally by the House of Lords. But were it (a legacy payable to the wife at her age of twenty-five) not in strictness to operate by way of assignment, yet it would be *good* as an agreement; especially when made for a *valuable* considerati-on."

In *Grey* v. *Kentish* (*c*), *Lord Hardwicke* expressed his opinoin as follows:—"A husband cannot assign in law a *possibility* of his wife; but this Court will, notwithstanding, support such an assignment for a *valuable* consideration." And in a subsequent case of *Hawkins* v. *Obyn* (*d*), his Lordship gave a similar opinion, in relation to the husband's power to assign the possibility of his wife for *value*.

Lord Alvanley's opinion must have been the same, in regard to the husband's power over his wife's reversionary interest, when he pronounced his decrees in *Hewitt* v. *Crowcher*, and *Greg* v. *Crowcher* (*e*); for unless the husband had the power of assigning it for value, the wife's examination and consent in Court to the transaction would doubtless not have been received.

With respect to decisions upon the subject, I have found none previously to the modern case of *Hornsby* v. *Lee*, except one, which seems to show the habit or practice of the Court in these instances so long ago as

---

(*a*) 2 P. Will. 608. (*b*) 9 Mod. 102. (*c*) 1 Atk. 280. Ed. by *Sanders*. (*d*) 2 Atk. 551. (*e*) See 12 Ves. 175.

in the beginning of the reign of George the first, and that it was founded in analogy to the husband's power at law to extinguish or release his wife's reversionary choses in action.

The case alluded to is *Atkins* v. *Dawbury* (*a*), in which the wife was intitled to a legacy, payable out of lands, upon the death of a tenant for life. Her husband, during the lifetime of the tenant for life, assigned the legacy to trustees for the benefit of his children. After his death the life-estate determined, and the legacy became payable; and upon the bill of the children for the money, it was decreed, that since the husband, who had a power to extinguish or *release* the legacy, had made a good assignment of it in equity (although as a chose in action it was not assignable at law, it was actually recovered, *i. e.* it was actually recovered against the wife's title by survivorship.

The peculiarity of the above case is that the assignment may be considered *voluntary* (*b*); a consideration upon which it has been before shown a Court of Equity will not interfere in those instances against the title of the wife, but the principle of the decision shows clearly the husband's power in equity, in analogy to law, to bind his wife's right of survivorship to her reversionary interests by an equitable assignment for a valuable consideration. Probably the following proposition may be considered as warranted from what has been said,—that whenever the nature of the wife's interest is such as the law allows the husband to release it, a Court of Equity will permit him to assign it for value.

The cases which have been adduced to show that the husband cannot bind his wife's reversionary interests by a particular assignment for a valuable consideration, are either upon questions between her and general assignees under her husband's bankruptcy; or,

---

(*a*) Gilb. Eq. Rep. 88. (*b*) See Becket v. Becket, 1 Dick. 340.

in instances where there were no decisions upon the point, and the Court merely declined to act upon his wife's consent so as to prejudice the question of her title by survivorship before the period arrived when it would arise, viz. upon her husband's death, as will appear from the cases after stated.

In *Grey* v. *Kentish* (*a*), the wife was intitled to a share of South Sea annuities subject to her mother's life-interest, and to the contingency of her (the wife) being living at her mother's death. The husband became a bankrupt, and died *before* the mother. His wife petitioned, as surviving him and her mother, to have the share transferred to her; and *Lord Hardwicke* so ordered against the assignees under the bankruptcy; and upon the principle, as it would seem, before stated, in regard to such class of assignees (*b*). No particular objection was taken to their claims, on the ground that this was a contingent reversionary interest; nevertheless his Lordship declared, as it was before observed, that although the husband could not at law assign a *possibility* belonging to his wife, yet that a Court of Equity would support such an assignment for a valuable consideration.

Gayner v. *Wilkinson* (*c*), before *Lord Bathurst*, was another case between the surviving wife and the assignees of her husband. The wife was intitled to a share in a sum of money expectant upon the death of *A*, if the wife were then living. The husband became a bankrupt, and died, *after surviving A*, leaving his wife the survivor. The share was decreed to belong to the wife by his Lordship dismissing the bill against the assignees; but the decree was made, as it would seem, upon the principle, that no act had been done in the husband's lifetime to reduce the fund into possession,

---

(*a*) 1 Atk. 280. Ed. by *Sanders*. (*b*) Vide *supra*, p. 227.
(*c*) 2 Dick. 491. 1 Bro. C. C. 50. S. C. in notes.

as he or his assignees had power to do after the death of *A*, and not upon the inability of the husband or his assignees to assign the same for value to bind the wife's right by survivorship.

As to wife's consent in Court to the passing of her reversionary property.

4. In considering the unsettled question, when the wife will be permitted to consent in Court as to the disposal of her reversionary personal property, those cases which relate to personal estate settled to her *separate* use and *appointment* must for the present be excluded, since the principles applicable to them do not apply to this inquiry.—Suppose, then, a married woman to be intitled to personal property, or to the interest of it, absolutely or for life, after the death of *A*; can she, during her marriage with *B*, consent to the disposition by her husband of her interest against her own title in the event of surviving him? In the most modern cases her power to do so has been doubted. In other cases her consent has been taken, and no doubt entertained of her having that power, but some of them it is conceived have gone farther than any principle can warrant.

It is presumed that the principle applicable to correct determinations upon this subject is this—that when property is so given to the wife, either in remainder or contingency, as that the husband may release it at law (*a*), as in the instance above supposed; if he assign it for *value*, the assignment will bind the wife in equity; so that her consent, by way of confirmation and to waive her title to a settlement, ought upon such principle to be received and recorded. But that when the wife's consent is offered to pass her reversionary interest in analogy to a *fine* at common law, in favour of the husband or his assignee, *without* a *valuable* consideration, the Court must decline to receive it, because no analogy between the two acts exists (*b*), they differing

---

(*a*) 2 Roll. Rep. 134, et vide ante, p. 238. (*b*) 10 Ves. 567. 8 Ves. 174.

both in forms and principles; and because the property is not assignable at law, and there is no consideration to induce a Court of Equity to act or interfere (*a*).

It is probably to the want of attention to this distinction that the discordant adjudications to be found in the cases may be attributed.

The above principle will support *Lord Alvanley's* decree in *Hewitt* v. *Croucher* (*b*), in the year 1800, which states that the wife being present in Court and examined, and desiring that the contract should be carried into execution, it was decreed accordingly. But such principle will not support the case of *Butler* v. *Duncombe* (*c*), in which the Court ordered upon the examination of the wife a moiety of her portion, payable at her mother's death, to be sold or disposed of at her husband's pleasure.

With the distinction above taken agrees the very modern case of *Pickard* v. *Roberts* (*d*). A testator gave personal estate to trustees in trust to pay the interest to his wife for life, and after her death to make equal division of the fund among his children who should attain the ages of twenty-one years. He at his death left three children and his wife surviving him: The widow made a gift of her life interest to *A*, the husband of *B*, one of the children, and they three petitioned that the *reversionary* interest of *B* who had attained twenty-one, *should be paid to her husband A*, *B* and the widow also consenting. But the Vice Chancellor refused to make the order.

It is observable that in the last case the consent was offered to *pass* the wife's *reversionary* interest *to her husband*, in the absence of any power enabling her to dispose of such an interest, and whilst under the dis-

---

(*a*) On this subject see Ritchie v. Broadbent, 2 Jac. and Walk. 456. Howard v. Damiani, ibid. 458 *n*. Breton v. Lord Clifden, 1 Sim. and Stu. 363. (*b*) Stated 12 Ves. Jun. 175. (*c*) 2 Vern. 762. (*d*) 3 Mad. 384.

ability of coverture, without any valuable consideration, and, as it seems, upon the supposed analogy between her examination and consent in equity and a fine at law, an analogy which his Honour observed was always disclaimed in a Court of Equity.

The case which followed *Hewitt* v. *Crowcher*, before referred to, was *Woollands* v. *Crowcher* (*a*). There the wife was intitled, amongst other property, to interest upon a share of 1225*l.* stock for her life, expectant upon the death of *A*. The husband and wife agreed to sell this reversionary interest for 180*l.*, but the purchaser required the wife's consent to be expressed in Court to the transaction; in order to obtain which the husband and wife filed a bill for a performance of the contract. But *Sir William Grant* would only take the wife's consent *de bene esse*, so as not to preclude the question as to her title by survivorship, if it should arise in that event happening. Upon that occasion his Honour said, that the effect of an assignment upon *reversionary* property had been doubted, and referred to the argument of *Mr. Maddocks*, in *Saddington* v. *Kinsman* (*b*), as to the Court not anticipating future property; but he admitted that other cases had said, that the Court would do so; and that it had so done in *Hewitt* v. *Crowcher* and *Gregg* v. *Crowcher* before *Lord Alvanley*, and mentioned in the argument.

The present disposition of the Court is not to take wife's consent to part with her reversionary interests.

It will occur to the reader, that in the last case the wife's interest was such, as her husband might have released (*c*); for it was an interest which might have fallen in during the marriage, viz. by *A*'s death. It seems, therefore, singular that when the husband, instead of exercising his legal power, assigns the property for *value*, a Court of Equity should interpose obstacles

---

(*a*) 12 Ves. Jun. 174. (*b*) 1 Bro. C. C. 44. (*c*) Ante, p. 238, and 1 Salk. 115.

in not permitting the wife to confirm the transaction by examination and absolute consent. Indeed the present disposition of the Court is not to take the absolute consent of the wife to the passing of her *reversionary* interest to a purchaser from her husband, but *de bene esse* only; and for the reason assigned by *Sir William Grant* in the above case of *Woollands* v. *Crowcher*, viz. because of the doubt now entertained as to the validity of the husband's assignment for *value* of his wife's *reversionary* property against her title by survivorship; and therefore not to prejudice her right if she were the survivor, and the Court should decide the question in her favour.

It is presumed, however, for the reasons before mentioned, that there is no solid distinction between reversionary interests of the wife and her other choses in action, in regard to the power of the husband to dispose of them in equity so as to intercept her title by survivorship, when they are *bona fide* assigned for *value*, and are such as may possibly accrue during the marriage, and are not settled before it as a provision for the wife in the event of her surviving him.

To pursue the analogy between law and equity. It appears before (*a*), and it will be shown afterwards, under the consideration of the effects of marriage upon the prior acts and agreements of husband and wife, that he at law can neither dispose of nor release such part of her personal property as cannot possibly accrue during the coverture. In conformity with this rule, it is determined in equity that where a woman stipulates, in the event of *surviving her husband*, that her property shall become her own, reserving no power of disposition over it during the marriage; neither her husband can dispose of it by sale or otherwise, nor can she do so during his life, either by deed, will, *consent*,

In equity as well as at law husband cannot dispose of, nor can wife by consent dispose of, property reserved or given to her, which cannot accrue during the marriage.

(*a*) Page 241.

or charge. And the principle is the same when personal property is so given or left to her.

In the two cases of *Richards* v. *Chambers*, and *Seaman* v. *Duill* (*a*), by the first of which, property was settled in trust for the separate use of the wife for life, and if she survived her husband then to be absolutely hers; but if she died before him, then as she by deed or will should appoint, and in default of appointment to her executors and administrators; and by the second of which cases, the property was settled to the husband for life, and if he survived to him absolutely, but if she survived, then to her absolutely: the question was, whether the contingent interests which the wife, whilst *sui juris*, had secured to herself in the event of *surviving her husband*, could by her *consent*, through the interposition of the Court, be given up by her to her husband while she was in a state of coverture? And *Sir William Grant*, then Master of the Rolls, determined in the negative; and said, that the interests were of such a nature, that if they had been created by another person the husband would have had no power over them, for he could not affect her interest which *could not* take effect in possession during his life.

And her bond will not bind such her interest.

The same point again occurred before that judge in *Lee* v. *Muggeridge* (*b*), with the additional circumstance, that the wife entered into a bond to pay a considerable sum of money by her heirs, &c. within six months after her death. After that event happened, the bond creditor filed a bill to subject her separate estate to the payment of the debt; but the Court held, that as the wife during the marriage could not, for the reasons before mentioned, dispose of her contingent interest by *direct* appointment, *a fortiori*, she could

---

(*a*) 10 Ves. Jun. 580. (*b*) 1 Ves. and Bea. 118. See also O'Keate v. Calthorpe, stated 8 Ves. Jun. 177. Nevison v. Longden, in the Court of Exchequer, in June, 1800.

not do so by her bond. It appeared that she, after the decease of her husband, in answer to a letter requiring payment of arrears of interest, stated, that she was unable to discharge the bond, but that it would be settled by her executors. As to this, his Honour observed, that if she had done any thing that set up the bond, or if there was a new contract, her assets would be liable; but that previously the plaintiff must establish his right at law.

Case in which the Court refused to take the wife's consent to the passing her reversionary interest, which could not fall into possession during the marriage.

The principle upon which the last two cases were decided, will support the determination of *Eyre*, C. B., in *Fraser* v. *Baillie* (*a*). In that case the husband vested money in trustees to pay the interest to himself for life, and *upon his death*, in trust, as to part of the capital, to pay the *interest* to his wife for life; and after the survivor's death, to divide that part among children, &c., subject to the wife's appointment; and in default of appointment, among them equally, and if no children, then for the husband. The husband and wife, by deed of appointment of part of the money in favour of one of their sons, stated, that they meant to part with the *interest* of it during their lives. The son, by his bill, prayed a transfer, and that the wife might be examined in court, to *consent* to the passing of her *interest for life*; but the Chief Baron refused to interfere.

Whatever might be his Lordship's reasons for thus withholding his interference, it is conceived that he decided correctly; for in this case, the wife's life-interest was a remainder or reversionary interest, which could not possibly fall into possession during the marriage, and was intended as a provision for her in the event of her surviving her husband; so that the Court could not, with any consistency of principle, authorise the wife during the marriage, (although she consented)

(*a*) 1 Brown, C. C. 518.

to part with such provision; this case, therefore, is governed by the same reasoning which produced the decrees in the two cases last stated.

Nor will the Court take her consent to part with her interest, given to her upon surviving her husband, although she have power to appoint the fund if she die before him.

The power of appointment given to the wife in the above cases of *Richards* v. *Chambers*, and *Lee* v. *Muggeridge*, merely applies to the disposition of the fund upon the contingency of her dying *before* her husband; it cannot therefore affect the interest which she has in the same property in the event of her *surviving* him: so that if she had executed her power, it could only have been effectual upon the contingency of her death during her husband's life; and if, on the contrary, she were the survivor, then she would be intitled to the whole fund, notwithstanding the appointment. Hence it appears, that although a wife in such a case appoint under the power, the Court cannot act upon it, through the medium of her *consent* to give up immediately the fund; which would have the effect of defeating her other contingent interest, because the power does not extend to such latter interest; and since she does not take it to her separate use, and is unable to deal with it as a *feme sole*, and as it is given or reserved to her as a provision upon her *surviving* her husband, and cannot be reduced into possession during the marriage, and therefore not at law disposable by the husband, the Court of Chancery will not, and it in fact has no jurisdiction, to anticipate the application of the fund, upon the *consent* of the wife for the purpose. The cases last referred to prove this.

There are cases, however, prior to those, which are at variance with them, but which upon principle appear to be of no authority.

The leading opposition case is *M'Carmick* v. *Buller* (*a*); there, upon the marriage, 4000*l.*, (the wife's fortune, with 5000*l.* to be secured upon the husband's

---

(*a*) 1 Cox. Rep. 357. 8 Ves. Jun. 174.

real estate) were settled upon *trust* to pay the interest of the whole to the husband for life, with remainder to his wife for life, and after the death of the survivor, to pay the principal as such *survivor* should appoint. The wife agreed to give up her interests to her husband; and they by deed poll *appointed* the funds immediately and absolutely to the husband. A bill against the trustees and wife was filed by the husband to carry the deed into effect; and the wife, by her answer, submitted to the prayer of the bill. After she had been examined in Court, it was decreed accordingly.

This case appears to be in contradiction to the principles before stated, and to the authorities above set forth and referred to. It cannot escape observation, that in this instance the wife stipulated for a provision for herself for life, in the event of surviving her husband, with a power also in the same event of disposing of the capital; which was in effect reserving to herself her own property if she survived him. She in fact took the best method to place her fortune out of her own reach during the marriage, with a view of preserving it for herself both at law and in equity, if she happened to be the survivor. It was surely, then, a great stretch of power in the Court of Chancery to leap over all these bars and fences, and by a single breath of the wife, under the influence and disability of coverture, to order the funds to be paid to the husband, in opposition also to his own express stipulation upon the marriage. The authority of this case has been questioned, as it might be expected, by modern judges (*a*); yet it seems to have had effect in producing similar decrees in some subsequent cases (*b*): but they must

---

(*a*) See the cases of Nevison v. Longden, in the Exchequer, in the year 1800. Sperling v. Rochfort, 8 Ves. 174. Richards v Chambers, 10 Ves. 583—585. (*b*) Ellis v. Atkinson, 3 Bro. C. C. 565, and Guise v. Small, 1 Anstr. 277.

fall with their principal, and all of them appear to have been over-ruled by the contrary decisions before stated and referred to.

But if she can execute the power during the marriage, and does so, this will defeat her reversionary interest.

The case of *Frederick* v. *Hartwell* (*a*), decided by *Lord Kenyon* previously to *M'Carmick* v. *Buller*, differs from it in these important particulars; that the property was not the subject of settlement upon the marriage, and the power to appoint was not postponed till after the marriage must have determined, but it might have been executed by *immediate* disposition of the fund, at any time during the coverture. The subject was a bequest by a stranger to the wife's separate use for life, and after her death, in trust as to the capital, as the wife should by deed or will appoint, and in default of appointment, for her absolutely; she, therefore, might defeat her ultimate interest by exercising her power of appointment. She did so, by appointing by deed the fund to her husband. They filed a bill for a transfer to him, and upon her examination and consent (*b*) in Court, it was ordered accordingly.

In this case it appears that the whole property was under the wife's dominion during the marriage. It did not depend, or was not intended to depend upon the contingency of her being the *survivor*, as in *M'Carmick* v. *Buller*; but the power was so given as to authorise her, by executing it, to make an immediate disposition of the property, and even in favour of her husband, which she did accordingly. The Court, therefore, acting upon the appointment, and her consent, necessarily ordered the transfer.

Upon the same principle, the case of *Newman* v. *Cartony* may be reconciled, if the wife made an ap-

---

(*a*) 1 Cox. Rep. 193.

(*b*) The examination is unnecessary in cases of this description, the property passing by the appointment. Sturges v. Corp. 13 Ves. 190.

pointment; but which does not appear in the short note of the report (*a*). So that when the wife takes an estate for life, with a power of immediate disposition of the property, and in default of appointment, to herself absolutely, it is presumed, that if she execute the power in favour of her husband, and consent to waive her right to a settlement, the Court will order an immediate transfer; but not without her having executed the power; otherwise the Court, by her mere consent, would be authorising her to pass an interest in her property which could not possibly fall into possession during the marriage, viz. her interest in default of appointment, and to do which the Court has no jurisdiction, as before appears.

But the power must be executed.

But in all cases where the interest of the wife is such, that the Court will accept her consent to the passing of it, the property must be first ascertained, and the amount clearly known.

And the amount of the fund ascertained.

Thus in *Edmonds* v. *Townshend* (*b*), in answer to a proposal that the wife's consent might be taken for the whole amount of the fund, without deduction, which would cover any less sum to which by abatements it might be reduced, the Court of Exchequer said, "that would be in effect taking her consent now to a sum to be ascertained at a future time, and be thereby depriving her of the power of changing her mind in the interim, which ought not to be done."

And in *Sperling* v. *Rochfort* (*c*), *Lord Eldon* said, it was *settled*, that whilst the property was unascertained, the wife's consent was not to be asked by the Court; and that whilst the Court could not state the amount of the property, it would not address to her any question, or speculate upon what might be her inclination. Upon this want of certainty in the amount of the funds, his Lordship pronounced his decree in that case.

(*a*) 3 Bro. C. C. 346—notis. (*b*) 1 Anstr. 93. (*c*) 8 Ves. 180. Jernegan v. Baxter, 6 Madd. 92, S. P.

CHAPTER VII.

HAVING in the two last chapters treated upon the husband's interest in and power over his wife's personal estate, it is necessary to consider under the same title, when a Court of Equity will modify and restrain that power, by requiring the husband to make a settlement in favour of his wife and children; also her equity when he refuses to do so; and her title to maintenance.

It is proposed to discuss these subjects in this chapter, under the following arrangement:

I. *The equities of the wife and her children to a* SETTLEMENT *out of her choses in action.*
   1. *Against her husband; and her character as a ward of the Court of Chancery is considered.*
   2. *Against his assignees in bankruptcy, &c.*
   3. *Against his assignee a purchaser for a valuable consideration.*
   4. *When payment or transfer of the funds to the husband will defeat his wife's equity, and*
   5. *When her own misconduct will have the like effect.*

II. *The rights of husband and wife in her choses in action, when he refuses to make any settlement upon her, or when he deserts her, or when he compels her to quit his house.*
   1. *When he refuses to make a settlement upon his wife, but maintains, or is desirous of supporting her.*
   2. *When he deserts her, or compels her to quit his house; and the rights of her creditors upon her equitable property in such cases.*

3. *When the wife, without a sufficient cause, withdraws from, or refuses to cohubit with, her husband; and*
4. *The effect of her misconduct upon her equity for a maintenance.*

It has been observed, that the choses in action of the wife which are assignable at law, the husband may assign at his pleasure; and it is conceived that persons claiming such species of his wife's personal property, by conveyance from him, either as volunteers or for valuable considerations, will be intitled to hold them exempt from any right of his wife to a settlement, since a Court of Equity will not interfere at her instance, in order to procure a provision for her out of the assigned property.

Difference between a legal and an equitable assignment in regard to wife's title to a settlement.

In thus declining to interfere, Courts of Equity are guided by the rules of law, according to which those Courts hold that where the law allows of an assignment, they will not entertain jurisdiction for the purpose of depriving the assignee of the full benefit of his legal title, when he is under no necessity of seeking any relief or discovery from a Court of Equity (*a*).

But if the husband or his assignee have no title at law to recover the wife's property, as where it is an equitable interest; in such case, as they are obliged to apply to a Court of Equity for the recovery of it, that Court will (except in the instance of a trust-term) (*b*) impose terms upon them. It will stipulate, as the consideration for lending its assistance, that a provision shall be made out of the fund, or out of the husband's other property, for his wife and children (*c*).

[It has been contended that the wife's equitable right to a provision, extends as well to her choses in action, recoverable at law, as to those which are re-

---

(*a*) 2 Ves. Jun. 608, 682. (*b*) 1 Vern. 7—18. 2 Vern. 270. Ed. by *Raithby*. See *vid. post*. (*c*) 2 P. Will. 639.

coverable in equity (*a*); and, in one case (*b*), it appears that an injunction was granted on this ground, to restrain the husband from getting in a debt due to his wife on bond. *Lord Hardwicke* is reported to have said, that he did not know whether the Court would not, at the suit of the wife, enjoin the husband from taking out execution upon a judgment obtained for a bond debt due to the wife *dum sola* (*c*); and perhaps an inference in favour of this argument may be drawn from the case of *Ellis* v. *Ellis* (*d*), where the Court, though apparently considering that the husband might by assignment defeat the wife's equity, restrained the exercise of that power. With these few exceptions, the authorities are uniformly against the extension of this right to property not within the jurisdiction of equity (*e*).

But where the property, though in its nature legal, becomes from collateral circumstances the subject of a suit in equity, it appears that the wife's right to a provision out of it will attach. Thus, in a case, where a legal debt was due to the wife, *Lord Eldon* observed, that if the husband had filed a bill to establish a right of set off in equity, in respect of that debt, he must have made his wife a party, thereby letting in her equitable claim (*f*). In *Oswell* v. *Probert* (*g*), the fund arose from a real estate, which had been sold under a decree obtained by a creditor. It was contended that the wife's interest in the real estate was legal, and therefore that she was not intitled to a provision out of the produce. The *Lord Chancellor* thought that the estate was subject to a power of sale; but he put the wife's right upon the ground that her husband's assignees were obliged to come to an equitable jurisdiction, to

---

(*a*) Clancy on the Equitable Rights of Married Women, p. 215. (*b*) Winch v. Page, Bunb. 87. (*c*) 2 Atk. 420. (*d*) Cited *post*, p. 262. (*e*) *Ante*, 257. *Post*, 272. (*f*) Ex parte Blagden, 2 Rose, 251. (*g*) 2 Ves. Jun. 680.

obtain the benefit of the property. Where a leasehold estate was bequeathed to the wife, and the executor assented, in a suit afterwards instituted by him to pass his accounts, the *Lord Chancellor* said, that if the husband had asked the aid of equity, it would only have been granted upon terms; but that by the executor's assent the husband had gained a legal interest in the term (*a*). If the executor had not assented, the right of the husband could only have been enforced in equity, and it seems that the wife's right to a provision would have followed. So if a mortgage debt be recovered by a foreclosure suit, the same consequence ensues (*b*); and it seems that the principle would be the same if a legal debt, due to the wife, were recovered in equity, in a suit for an account, or in a suit for the administration of the assets of the debtor. It appears to be the usual practice in Chancery, when money is paid to the husband, in right of the wife, to require the consent of the latter, without inquiring whether the property from which it has been derived was originally of a legal or an equitable nature.

Where the wife is intitled to the trust of a term, it seems that she will be intitled to a provision out of it as against her husband, though it is, perhaps, doubtful whether she will be so intitled as against his assignee, for valuable consideration (*c*).]

The Court has never required the husband, or the persons claiming under him, to settle the *whole* of the wife's choses in action upon her and her children, but a reasonable proportion of them only. This point was maturely considered by *Sir Thomas Plumer*, then V. C. in the case of *Beresford* v. *Hobson* (*d*), when, after a revision of all the authorities, his Honour came to the above conclusion.

(*a*) Adams v. Peirce, 3 P. W. 11.
(*b*) 1 P. W. 549.
(*c*) See *Post*, part 3 of this section.
(*d*) 1 Madd. 363.

In that case, upon a reference to the Master to receive proposals for a settlement upon the wife of a bankrupt, he reported that he allowed the *whole* of the fund to be settled upon her, which was a legacy, because she had been deserted by her husband, and left by him without the means of support. Upon exceptions to the report, *Sir Thomas Plumer* allowed them, and directed the Master to review it, observing that in no case the Court had given the *whole* to the wife, and that in most of the cases the question had been, how much she should have, and in determining it, the Court had exercised a discretion, and had not tied itself down to any precise rule, but that it had *never* given the *whole*.

[Most frequently one-half of the fund has been settled upon the wife and children (*a*), but the proportion given to them in each case depends upon all the circumstances; and in fixing it, any previous settlement which may have been made, and any property of the wife's which may have been previously possessed by the husband, are taken into consideration (*b*).]

What we shall now consider will be—

1. The wife's title to a settlement as against her husband.

May file a bill to enforce it.

It has been the language of some cases that a Court of Equity will not interfere at the suit of the wife, and direct her husband to make a provision for her, as if the equitable jurisdiction for that purpose were confined to instances merely where the husband, or the persons claiming under him, were the plaintiffs. It seems, however, to be now settled that a Court of Equity will enforce her right at her own suit by her next friend, when the subject is of *equitable*, not of legal cognizance.

(*a*) Jewson v. Moulson, 2 Atk. 423. Worrall v. Marlar, 1 Cox, 153. 2 Dick. 647. Brown v. Clark, 3 Ves. 166. Pringle v. Hodgson, ibid. 620. Steinmetz v. Halthin, 1 Glyn and Jameson, 64. Ex parte O'Ferrall, ibid. 347. See 5 Madd. 164. (*b*) Green v. Otte, 1 Sim. and Stu. 250.

Thus in *Elibank* v. *Montolieu* (*a*), *Lady Elibank* being intitled to considerable personal property, as one of the next of kin of *Lady Cranstown*, filed a bill against her husband and *Lord Montolieu*, the administrator of *Lady C.* and who was also a brother and one of the next of kin of *Lady C.* praying an account of the plaintiff's share, and that it might be settled upon herself and children. *Lord Montolieu*, by his answer, insisted upon retaining the plaintiff's share towards satisfaction of a debt owing him from her husband, on the ground of a provision made for her by settlement prior to her title to such personal property, but which was not adequate to her fortune, and appeared to have been made upon the expectation that by circumstances to occur in the family, there would be an opportunity to do better for her at a future period. The question was, whether the plaintiff was intitled to the relief prayed by her bill, as against *Lord Montolieu*, under the circumstances stated? And the Court decreed in the affirmative; the Chancellor having delivered the judgment thus: "The only difficulty which I had in this cause was upon the *form* of the suit, *whether a married woman by her next friend could be a plaintiff in this Court.* With respect to the point made by the answer of *Lord Montolieu*, that he had a right to *retain* against the debt of the husband, being possessed of the fund as administrator, and the wife being one of the next of kin, I am clearly of opinion that the defendant had no right to retain. The administrator is trustee for the next of kin, the plaintiff being one of them. If she have any equity against her husband, with regard to this money, that equity will clearly bar any right of retainer he can set up to the property of which he became administrator. With respect to the only difficulty I had upon the point of *form*, if she be intitled, and

---

(*a*) 5 Ves. 737; and see Gardner v. Walker, 1 Stra. 503, and *infra*, pl. 4.

there is no way of asserting her right against her husband except by bill, that objection, I think, does not weigh much: if the defendant, *Montolieu*, had done what would have been the natural and the right thing, and what he certainly would have done but for his own interest, he would have been plaintiff, desiring the Court to dispose of the fund, and for her benefit to protect her interest in it. Then, upon all the circumstances it is very clear, if it had come before the Court, it would have been matter of course to have pronounced upon her equity upon the bill of the administrator, praying that the money in his hands might be properly disposed of; and I would not have suffered this money to be paid to *Lord Elibank* without making a provision for her; for the provision upon her marriage was clearly inadequate to her fortune, and it is clear that that provision was made upon the expectation that by circumstances to occur in his family there would be an opportunity to do better for her at a future period. The difficulty was, that it is very unusual in point of form, the bill being filed by the wife instead of the husband."

In *Ellis* v. *Ellis* (*a*), the Court entertained a suit *by* the wife to restrain her husband from assigning or transferring for a valuable consideration her equitable property, and the Chancellor continued the injunction, ordering the husband to make proposals for a settlement.

And in the mean time the Court has restrained the husband from assigning.

And in *Roberts* v. *Roberts* (*b*), the Master of the Rolls granted the like injunction in order to prevent the necessity of new parties; but he said, he desired to be understood that he did not make the order under an idea that a purchaser or assignee for a valuable consideration of the husband of the wife's property could put himself into a better situation than the husband; and he added, that the more he thought upon the subject the more he was satisfied that such an assignee must

---

(*a*) 1 Vin. Abr. Sup. 475. (*b*) 2 Cox. Rep. 422.

be subject to the same equity (*a*). But the principle for granting the injunctions in the two last cases is very questionable; for if the husband had a right to sell his wife's equitable choses in action, there is no reason why he should be prevented: and in *Pulvertoft* v. *Pulvertoft* (*b*), *Lord Eldon* refused to enjoin the husband from selling property of which he had previously made a voluntary settlement after marriage upon his wife and children.

But the principle of those cases is questionable.

With respect to retainer or set off, mentioned in the above case of *Elibank* v. *Montolieu*, it was also decided in *Carr* v. *Taylor* (*c*), that although the husband was indebted to the estate of the person under whom the wife claimed the property, yet the administratrix of such person could not set off the debt against the wife's title by survivorship to the fund; for the property being a share of a residue, the Court said it could not be sued for but in the joint names of husband and wife, and that if he had died without reducing it into possession, it would have survived to her, and consequently free from the husband's debt.

There can be no set off of the husband's debts to defeat the wife's title by survivorship.

The equity of the wife for a settlement as against her husband, is indeed so well settled as to require the production of no cases in proof of it.

But, according to the most approved opinions, it is an equity originating in and *personal* to her, so that if she be intitled to an equitable interest, and dies, leaving a husband and children, the latter being unprovided for by settlement, and he file a bill to recover such interest, his children cannot oblige him to make a provision for them out of it.

The wife's title to a settlement is personal to her, and does not extend to her children.

This was solemnly decided and acknowledged by *Lord Northington*, in *Scriven* v. *Tapley* (*d*); in which

---

(*a*) In the following references the wife was plaintiff, 10 Ves. 574. 1 Atk. 192. 1 Dick. 373. (*b*) 18 Ves. 84. (*c*) 10 Ves. Jun. 574. See Ex parte Blagden, 2 Rose, 249. Ex parte O'Ferrall, 1 Glyn and J. 347. (*d*) Ambl. 509.

case he reversed the decree of the Master of the Rolls; and in *Murray* v. *Lord Elibank* (*a*), *Lord Eldon's* opinion seems to have agreed with the principle of the above decree; which principle seems to be, that when the Court has obtained jurisdiction over the subject, it will not part with the fund without making a provision for the wife, and will extend such provision to her children in making it for her, just as the Court is in the habit of acting towards children unprovided for, when it sanctions an allowance for others of the same family for whom fortunes are provided, by increasing the amount of such allowance, in order that *all* the children may be maintained.

It is true that contrary opinions prevail upon this subject (*b*), but the rule of the Court is probably as considered by *Lords Northington* and *Eldon*, and also by the present Master of the Rolls, in *Lloyd* v. *Williams* (*c*); in which case all the authorities were reviewed, and his Honour decided, that children have no right to a provision out of their mother's equitable property, independently of contract or decree.

The children may, however, prosecute an order for laying before the Master proposals for a settlement.

If an order be obtained for the husband to lay proposals before the Master for a settlement, and then the wife dies without waiving it, since such order is a judgment and the Court always includes the children in the settlement, they have by the order obtained a right to prosecute it and procure a provision for themselves (*d*). Their mode of proceeding is by supplemental bill (*e*).

[In a late case (*f*) it was decided that the right of the children to the benefit of the settlement to be made on their mother, attached upon the institution of a suit relating to the trust fund. The wife having died pending the suit, leaving the husband surviving, the children

---

(*a*) 10 Ves. 84. (*b*) See 13 Ves. 7. (*c*) 1 Mad. 450. (*d*) 2 Dick. 604. (*e*) 13 Ves. 1—9. (*f*) Steinmetz v. Halthin, 1 Glyn and J. 64.

were held intitled to a provision. If, however, the wife survives, and the husband has not assigned the fund for valuable consideration, the children will not be intitled to a provision as against her, as she takes the whole by survivorship (*a*).]

But the wife may waive such order by consent in Court, and defeat the children's right.

The children's right, however, under such order continues, according to *Lord Eldon*'s opinion, to be at the disposal of the wife until the business be completed; so that, if between those periods she appear in Court, and consent that her husband shall have the fund wholly and absolutely, it will be so ordered, and the children deprived of any provision out of it (*b*). But so far as the children are concerned, *Lord Hardwicke* seems to have differed from his successor; for he, in an *anonymous* case reported by *Vesey* senior (*c*), said, "that the wife might give up her interest, but that nobody could consent for the children, and that the proposal, which in that case had been made by the husband for a settlement, was binding."—This case is noticed by the late Master of the Rolls in *Murray* v. *Elibank* (*d*); and *Lord Eldon*'s opinion seems to be recognised and approved of by the present Master of the Rolls in *Lloyd* v. *Williams* (*e*).

The whole fund will be paid to the husband, if absolutely intitled, by the law of the state of which the wife is a subject.

When the wife is the subject of a foreign state, by the law of which her husband would be intitled to receive the *whole* of her property without making any provision for her, the Court will dispense with her consent, and order the fund to be paid to her husband without requiring any settlement (*f*).

But in cases where the wife consents that her hus-

(*a*) *Ante*, 217. See Johnson v. Johnson, 1 Jac. and Walk. 479. (*b*) 10 Ves. 88—90. 1 Mad. 450. See also, in relation to the wife's consent, 3 Atk. 71. 2 P. Will. 642. 2 Ves. Sen. 60. 2 Bro. C. C. 663. 3 Bro. C. C. 565. 3 Ves. 321. (*c*) 2 Vol. 672. (*d*) 13 Ves. 6. (*e*) 1 Mad. 466. (*f*) Sawyer v. Shute, 1. Anstr. 63. Campbell v. French, 3 Ves. 321. Dues v. Smith, Rolls, 27th June, 1822.

band shall have her property, the Court requires a proper affidavit by the husband and wife that no previous settlement has been made of it (*a*).

Commission to take wife's examination, how conducted and returned.

The separate examination of the wife being necessary to give effect to this arrangement, if she be abroad, or cannot attend in Court, she must regularly be examined under a commission to be issued for the purpose; and it must appear from the return of the commissioners, that after they had informed her of the nature of the order and transaction, she directed and consented that the fund should be paid or transferred to her husband for his own use, and that she voluntarily consented thereto. Her examination also must be in writing, and under her signature to the above effect; which signature, as also that of the commissioners, must be verified by affidavit (*b*).

An exception to this regular proceeding by commission occurred in *Minet* v. *Hyde* (*c*). In that case, it was ordered that the wife should appear before some of the plaintiffs and a magistrate of *Breda* for private examination, which, when taken, was to be attested by a notary public and translated upon oath.

[Where the amount of the fund is less than 200*l*., it is usually paid out to the husband on the joint petition of himself and his wife, without the separate examination of the latter (*d*).]

Settlements on wards of the Court of Chancery.

It is a high contempt of the Court to marry its ward without leave; and since such marriages are generally attended with previous circumstances of gross deception and misconduct, the Court is much more strict and severe upon the husband in regard to the terms of

---

(*a*) Minet v. Hyde, 2 Bro. C. C. 663. Binford v. Bawden, 1 Ves. Jun. 512. 2 Ves. Jun. 38. Hough v. Ryley, 2 Cox, 157.
(*b*) Tasburgh's case, 1 Ves. and Bea. 507. 2 Ves. Sen. 60.
(*c*) 2 Bro. C. C. 633. See also Campbell v. French, 3 Ves. 321.
(*d*) See Elworthy v. Wickstead, 1 Jac. and Walk. 69, and the references there.

settlement, than in those cases which are of more usual occurrence (*a*). The proportions of interest or of capital of the wife's fortune, which the Court will allow to the husbands of wards, depend upon the circumstances attending each case: sometimes none of the annual income or capital will be allowed or given to the husband.

The terms which have been imposed upon husbands, in regard to the interest or annual income of the fortunes of their wives, will be found in the cases below referred to (*b*).

And the terms in respect to capital may be seen upon consulting the authorities referred to in the notes (*c*).

If, however, a man of no property marry a ward without the leave of the Court, and fortune is his only object; in such a case, the Court will visit his offence by not permitting him to have any part of it (*d*).

Instance of husband being deprived of the interest of the wife's fortune.

Thus, in *Like* v. *Beresford* (*e*), the husband having eloped with, and married a ward of the Court, both the principal and the interest of her fortune were directed to be settled upon her for her sole and separate use during the joint lives of herself and husband, with a contingent interest in his favour upon the event of his wife's death before him without issue, and without her making any appointment of the property; and this settlement was directed and enforced against the assignment of such property by her husband for a valuable consideration, it having been made *pendente lite*.

Female ward cannot consent to give her fortune to her husband without a settlement.

It is also to be observed, that a ward of the Court, married as above, will not be permitted to consent for

---

(*a*) 3 Ves. 506. (*b*) Stevens v. Savage, 1 Ves. Jun. 154. Chassaing v. Parsonage, 5 Ves. 15. Millet v. Rouse, 7 Ves. 419. Bathurst v. Murray, 8 Ves. 74. (*c*) 5 Ves. 15. Wells v. Price, 5 Ves. 398. Winch v. James, 4 Ves. 386. Priestley v. Lamb, 6 Ves. 421. Millet v. Rouse, 7 Ves. 419. Bathurst v. Murray, 8 Ves. 74. Halsey v. Halsey, 9 Ves. 471. Pearce v. Crutchfield, 16 Ves. 48. (*d*) Ball v. Coutts, 1 Ves. and Bea. 303. (*e*) 3 Ves. 506.

her husband to have her property without making any settlement upon her; the contrary of which rule we have seen to prevail in other cases (*a*); and a marriage *de facto*, although not a legal one, will be equally sufficient to found the jurisdiction of the Court as if such marriage had been duly solemnized (*b*).

Marriage *de facto*, &c.

2. The wife and children's equities for a settlement, out or in respect of her choses in action, against the assignees in bankruptcy of her husband, or his assignees under the insolvent debtors' acts, or under an assignment by him to pay his debts, are the same as against himself, which have been before considered.

Hence if the wife's property be such as he could recover at law, the above assignees will also be intitled to recover and receive it; and as the husband is, in such a case, under no obligation to make a settlement upon his wife or children, neither are his assignees (*c*), for the titles of the husband and his assignees being complete at law, there is no principle of equity upon which the Court of Chancery can assume a jurisdiction to interpose on behalf of the wife, to restrain her husband or those claiming under him from enforcing their legal rights.

Wife has no such equity if the assignees can recover the property at law.

But, on the other hand, if the wife's interest in her property be *equitable* only, then a Court of Equity will impose the same terms upon the assignees, in regard to a settlement on the wife and her children, as we have seen that it will do upon the husband (*d*).

3. With respect to an assignee claiming by *purchase* from the husband, whether the Court would or would not impose any such condition upon him as to make a settlement, has been long a disputed question. The result however seems to be, that he is bound to make a

Presumed that an assignment for value will not bar the wife's title to a settlement.

(*a*) Stackpole v. Beaumont, 3 Ves. 89, 98. (*b*) Salles v. Savignon, 6 Ves. 572. (*c*) 2 Atk. 420, 2 Ves. Jun. 608-682, and vide *supra*, p. 227. (*d*) See the cases last referred to, and 9 Ves. 87. 2 Madd. 16, and *supra*, p. 257.

provision out of the fund for the wife and her children, and that subject to such provision, he will be entitled to the equitable property discharged from the wife's title by survivorship.

Cases considered.

This point, as to a settlement, appears to have been decided by *Lord Northington*, in the case of the *Earl of Salisbury* v. *Newton* (*a*), in the year 1759. There the wife was intitled to 2000*l*., a portion under her father's marriage settlement, or to a legacy of 600*l*. under his will in lieu of it; her husband being indebted by bond to the Earl, assigned to a trustee for the Earl all that he was intitled to in right of his wife for payment of the bond debt, and died, having made no provision for his wife and children. The bill was filed by the Earl against her trustee for an assignment. His Lordship gave the usual directions as to the assignee making a settlement upon the wife and her children, observing, that the assignee could not be in a better situation than the husband under whom he claimed, and who must have made the settlement if the application had been made by him instead of the assignee.

Notwithstanding this decision, the question has been considered unsettled. In *Worral* v. *Marlar*, and *Bushnan* v. *Pell*, in the year 1784 (*b*), *Lord Thurlow* inclined to the opinion that the wife's equity would not prevail against the assignee of the husband for a valuable consideration, but that opinion is opposed by the above decision of *Lord Northington*; and in another by the same judge in the year 1765. In that case (*c*), the husband and his wife assigned her interest in a legacy to secure to *A* 300*l*., which *A* became liable to pay in consequence of his being surety for the husband in a bond for that sum. Upon the bill of *A*, against the husband and wife, and the assignees under a commission of bankruptcy which had issued against the hus-

---

(*a*) 1 Eden's Rep. 370. (*b*) See note to 1 P. Will. 459.
(*c*) Wenman v. Mason, in a note, 1 P. Will. 549.

band for payment of his debt out of the wife's share in her legacy, it was so decreed, subject to the settlement of a part upon the wife and children. That case is very long and complicated, but I consider the effect of it to be such as above abridged and extracted in regard to this question.

In addition to these early decisions, and in opposition to the doubts of *Lord Thurlow*, there are the opinions of great judges in favour of the wife's equity, which are founded upon the principle before laid down.

In *Jewson* v. *Moulson* (*a*), *Lord Hardwicke* refused to order payment to the husband's assignees for valuable consideration of personal estate to which the wife was intitled under her father's will, and recommended them to agree to a settlement of part of the money upon the wife and her children, (which was assented to and done accordingly) his Lordship observing, "that he laid great weight upon the assignment comprehending the *whole* of the wife's portion, and that if he allowed that practice to prevail, it would trip up all the care and caution of the Court, for a husband then would have nothing to do but to take up money of a third person, and although neither he nor the lender knew exactly at the time what the fortune was, yet he might assign it over, and so defeat the care of the Court entirely."

In *Like* v. *Beresford* (*b*), *Pryor* v. *Hill* (*c*), and *Macaulay* v. *Philips* (*d*), the Court gave opinions agreeably to those of *Lords Hardwicke* and *Northington*. In the last of those cases *Lord Alvanley* expressed a decided opinion upon this subject to the following effect: "Many cases upon this point have been before me, which have put me under the necessity of considering very much the rights of the wife, and I am clearly of opinion the doubt respecting the assignment

---

(*a*) 2 Atk. 417. (*b*) 3 Ves. 511. (*c*) 4 Brown, C. C. 139. (*d*) 4 Ves. 19.

of the husband for a valuable consideration of the wife's equitable interest was not well founded, with the single exception perhaps of a *trust of a term of years* of land (*a*), upon which perhaps there may be some doubt; but, subject to that, I am clearly of opinion an assignment for a valuable consideration will not bar the equity of the wife, and it would be strange if it did, since in the Courts of Law, with regard to an action brought against executors by the husband for a legacy due to his wife, it is determined that an action does not lie, and the reason given is, that it would totally defeat the wife's equity. It would be whimsical, then, that the assignment by the husband for valuable consideration should put the assignee in equity in a better situation than the husband himself is in at law. The guard of this Court upon the wife's interest would be very singular if the husband, not being intitled at law, might assign it for a valuable consideration to another person who would be intitled in equity. I am clearly of opinion that it was only a doubt, and it never was decided that the husband could, by such assignment, or any other means, deprive her of her equity."

In *Franco* v. *Franco* (*b*), his Honour adhered to his opinion; and it seems that he was prepared to decide according to it, if the cause in its then stage would have permitted.

[And the right of the wife to a provision out of a principal fund belonging to her, and assigned by her husband for valuable consideration, is now considered as a settled point (*c*).

But it is doubtful whether the wife is intitled to a provision out of a trust-term belonging to her as against a purchaser. In some cases (*d*) the question was de-

---

(*a*) Vide *supra*, 177. (*b*) 4 Ves. 530. (*c*) See Elliott v. Cordell, 5 Mad. 149, and the cases there cited. (*d*) Tudor v. Samyne, 2 Vern. 270. Bates v. Dandy, 2 Atk. 207. See 2 Atk. 421.

Whether the wife's equity extends to a trust-term.

cided against her, and it is mentioned by *Lord Alvanley* as doubtful (*a*). These cases, however, occurred before the general equity of the wife as against her husband's assignee for valuable consideration was established; and they do not deny her right to a provision out of a trust-term as against her husband. There does not appear to be any sound principle for making a distinction in this respect between a trust-term and other equitable choses in action. It has indeed been considered, in questions relating to the wife's right of survivorship, that the rules applying to trust-terms must be the same as those applying to legal terms. But this has no application to her right to a provision, the whole doctrine of the wife's equity being a departure from legal analogy. And there is no inconsistency in allowing the husband's assignment of the wife's trust-term to defeat her right by survivorship, without affecting her right to a provision: this is the effect which is given to his assignment for valuable consideration of her other equitable choses in action. It has been suggested as a reason for distinguishing a trust-term from other trust property, that it may be taken in execution at law for the husband's debt under a *fieri facias* (*b*): but it is now settled that that writ does not extend to equitable interests in terms of years (*c*).

Where the husband has assigned for valuable consideration his wife's legal choses in action, which are immediately recoverable, and dies before her, it has been already observed, that (with some exceptions) they will, at law, survive to her, but that the assignee will (as it seems) be intitled in equity (*d*). But as he is under the necessity of resorting to the jurisdiction of equity to render his claim available against the legal right of the widow, it may be presumed upon principle

---

(*a*) 4 Ves. 19—528. (*b*) 4 Ves. 528. (*c*) Scott v. Scholey, 8 East, 466. Metcalf v. Scholey, 2 N. R. 461. (*d*) *Ante*, p. 226.

that relief would not be granted to him without a provision being made for her (*a*).]

But payment to husband before suit defeats wife's title to a settlement.

4. Receipt by the husband of the money, or a transfer to him of the funds, will defeat his wife's right to a settlement out of her choses in action, as we have before seen to be the case in relation to her title by survivorship (*b*).

If, therefore, before any proceedings be instituted in relation to such property, it be *paid* or *transferred* to the husband by the person in whose hands or name it is, and as it lawfully may, the payment or transfer will be good; and it will afterwards be too late to apply to a Court of Equity for its interposition for a settlement on the wife and children (*c*).

Thus, in *Murray* v. *Elibank* (*d*), *Lord Eldon* said, that the husband, where he can, is intitled to lay hold of his wife's property, and that the Court would not interfere; also, that previously to a bill filed, a trustee who has property real or personal, might pay the rents and profits, and might hand over the personal estate to the husband.

Not after bill filed.

But the trustee would not be justified in doing so after a suit is instituted. As to this, *Lord Eldon* expressed himself in the above case thus,—that *Lord Alvanley*, in *Macaulay* v. *Phillips* (*e*), had laid down, that after a bill filed, the trustee could not exercise his discretion upon that;—that the bill made the Court the trustee, and took away his right of dealing with the property, as he had it previously. *Lord Eldon* added, "that case was the last; and I think," said his Lordship, "that it contains very wholesome doctrine upon that point (*f*)."

In *Jewson* v. *Moulson* (*g*), *Lord Hardwicke* said,

(*a*) See *ante*, p. 258. (*b*) *Supra*, p. 220. (*c*) 3 P. Will. 11. 8 Ves. 206. (*d*) 10 Ves. 90. (*e*) 4 Ves. 18. (*f*) And see Steinmetz v. Halthin, cited *ante*, p. 264. (*g*) 2 Atk. 419; and see 1 Atk. 491, 516. Pre. Ch. 548.

And the Court will restrain husband from obtaining the wife's portion in the Ecclesiastical Court, until he has made a settlement.

that the Court would not suffer the husband to take his wife's portion (although the Ecclesiastical Court, which had a concurrent jurisdiction, had given its consent that the husband should have it), until he had agreed to make a reasonable provision for her; and that in many instances Courts of Equity had granted injunctions to stay proceedings in that Court.

Thus in *Gardner* v. *Walker* (*a*), the executor commenced a suit for the Court's direction as to a legacy bequeathed to *A*, the wife of *B*, praying to enjoin *B* from proceeding in the Spiritual Court, in a suit which he had instituted there for the legacy. This was resisted, on the ground of the Ecclesiastical Courts having proper jurisdiction over the subject, and that there was no precedent. But by *Lord Macclesfield:* "Then it is time to make one. Can the difference who is plaintiff in equity alter the reason of the thing? If it should, it will be but for the husband, instead of coming here, to go into the Spiritual Court, and so get the whole into his power. There must be the usual direction, that the money may be disposed of for the benefit of the wife."

But not from inforcing his legal right.

But although there be an early case in which the husband has been restrained from recovering at law the legal property of his wife, later opinions seem to have established, that a Court of Equity has no jurisdiction to prevent him exerting his legal rights to and for the recovery of his wife's property, whether by receipt of it or by action at law (*b*): and with respect to the case referred to (*c*), the reporter remarks, that the decision went a great length; and according to his conception, beyond what had been done in Chancery, the obligee being the defendant. The principle seems to be, that there can be no jurisdiction in the Court to

---

(*a*) 1 Str. 503. (*b*) 1 Ves. Sen. 539. 2 Atk. 420. 2 P. Will. 641. 10 Ves. 90. (*c*) Winch v. Page, Bunb. 86.

interfere, where the demand is legal and the person intitled proceeds according to law for the recovery of it.

Adultery of the wife bars her equity.

5. If the wife be an adulteress, living apart from her husband, a Court of Equity will not interfere upon her application for a settlement out of her own choses in action; neither will it order them to be paid to her husband: not to the former, because she is unworthy of the Court's notice or interference; nor to the latter, because he does not maintain her, in respect of which duty the law only gives to him her fortune.

Accordingly, in *Carr* v. *Eastabrooke* (*a*), cross petitions were presented by the husband and wife; the one praying, that 350*l.* belonging to her, might be settled to her separate use; the other, that the money might be paid to the husband, without his making any provision for her. The wife had eloped, and had lived in adultery, and her husband had obtained a divorce *à mensâ et thoro;* but at this time the adulterer was dead, and the wife was supported by his mother. The Chancellor said, he could make no order upon either petition, that he could not settle the sum to the wife's separate use, and that he must leave it as it was.

[But though the delinquency of the wife is a reason for not applying her property to her separate use, it is not a reason for allowing the husband to receive the whole, while not maintaining her. Hence in *Ball* v. *Montgomery* (*b*), where the wife was living in adultery, the dividends of a trust-fund, to which the husband was intitled for life *jure mariti*, were ordered to be paid into Court. The husband was allowed to receive out of the dividends the costs of a groundless suit instituted by the wife against him in the Ecclesiastical Court.

(*a*) 4 Ves. 146. See also Ball v. Montgomery, 2 Ves. Jun. 191, and Watkyns v. Watkyns, 2 Atk. 97. (*b*) 2 Ves. Jun. 191. 4 Bro. C. C. 339. See Alexander v. M'Culloch, cit. ibid. Bullock v. Menzies, 4 Ves. 798, cited *post*. Dr. Douglas's case, cited 10 Ves. 56.

It may be inferred from *Ball* v. *Montgomery*, that though the Court may not make a settlement on the wife when living in adultery, yet that it will secure her trust property for the benefit of the survivor, or of the children.]

But it is no bar in the instance of a female ward of the Court.

But the rule is different in instances of female wards of the Court who are married without its consent; for although they afterwards live in adultery, the Court will inforce a settlement (*a*), as also the provisions to be contained in it; because the marriage being a contempt, the Court obtained jurisdiction to commit the husband, in consequence of such misconduct, until he should make a proper settlement; and the Court will not part with that power until that act be done, whatever may be the irregularity of the wife's conduct, which may be attributed in some degree to her husband's misconduct in procuring such a clandestine marriage.

It sometimes occurs that a husband refuses to make any settlement upon his wife, in obedience to the directions of the Court; we shall therefore proceed to consider,

II. The rights of husband and wife in her choses in action, when he refuses to make any settlement upon her, or when he deserts her, or compels her to quit his house.

1. When he declines to make any settlement upon her.

Husband intitled to the interest of his wife's fortune, although he refuse to make a settlement.

Since the husband is obliged to maintain his wife, he will be intitled to receive the *annual* produce of her property, although he decline to make a settlement upon her.

Accordingly, in *Sleech* v. *Thorington* (*b*), the Master of the Rolls observed, that the Court had not thought itself empowered to take from the husband his wife's

---

(*a*) Ball v. Coutts, 1 Ves. and Bea. 302, 304. (*b*) 2 Ves. Sen. 561.

fortune, so long as he was willing to live with and maintain her; and that where a husband would not go in before the Master, even in that case the Court would not proceed so far as to do any thing in diminution of his right, so as to take away the produce from him, or to prevent his receiving the interest; but that the Court constantly, where the husband maintained his wife, accompanies the direction for a suspension with payment of the interest to the husband.

Not the capital.

The Court, however, will preserve the capital for the wife, until a proper settlement be made upon her and her children, as it has been shown in the first section.

Instance where he will be deprived of the interest.

And if the husband misconduct himself, as in the instance of receiving a considerable part of his wife's portion, so as to leave but a small part remaining, and then refuse to make an adequate settlement upon her, there, as *Lord Hardwicke* said, the Court would not merely stop the payment of the residue of her fortune, but prevent the husband from receiving the interest of that residue, in order that it might accumulate for his wife's benefit (*a*).

Husband's assignees take the yearly interest, subject to an allowance to his wife.

The husband, then, being intitled to the whole *annual* income of his wife's property, as a compensation for maintaining her, his assignees in bankruptcy, or under the insolvent debtors' acts, or trustees under his own assignment to pay his debts, will, as representing him, be intitled to receive such income; out of which they will be obliged to make a settlement or allowance to the wife for her support (*b*).

The principle upon which the law gives to the husband the personal estate of his wife, being, as it has been observed, to enable him to maintain her and the children of the marriage, it is a consequence,

2. That if he desert and leave her destitute, or compel

(*a*) 3 Atk. 21. (*b*) 2 Ves. Jun. 607—680. 4 Bro. C. C. 139. 3 Ves. 166. 5 Ves. 517. 11 Ves. 20, 21.

Wife's equity to a maintenance out of her property, &c.

her to leave him from cruel treatment or gross misbehaviour (*a*), his interest in her personal property will be suspended. In such cases the Court will prevent his receiving not only any part of the *capital* of her equitable property, but also the *interest* of it; for the reason of the law's giving to the husband the wife's personal estate being the consideration of their living together, and his maintaining their children, when, from his misconduct, these ends are defeated, a Court of Equity interferes, and preserves such of the wife's property as is within its jurisdiction, for her and her family, providing for them a maintenance out of it. In acting

---

(*a*) In questions arising out of disagreements between husband and wife, the Court of Chancery formerly exercised a much more extensive jurisdiction than at present (*a*). The tendency of the later cases has been to leave questions relating to the conduct of either party to the sole decision of the Ecclesiastical Courts; and Courts of Equity have not lately extended the practice of giving to the wife a separate allowance out of her trust property, beyond those cases where the husband neglects, or refuses, or is unable to maintain her (*b*). But where the wife has separated herself from her husband, by her own act, or with his consent, and applies for a maintenance out of her trust property, alleging that the separation was rendered necessary by the husband's ill-treatment, it is very doubtful whether the Court of Chancery would now entertain any original jurisdiction to determine that question, though it would probably suspend the payment of the interest to the husband, on the ground that while the separation exists, it is not applied to its proper purpose, the maintenance of both (*c*). If in such a case the question of conduct should be decided by the Ecclesiastical Courts in favour of the wife, as those Courts cannot give any remedy for alimony beyond a personal decree against the husband, there would be a good ground for the interference of a Court of Equity to allow her a maintenance out of her trust property. Possibly similar relief might in some cases be given to her during the proceedings in the Ecclesiastical Courts, to render effectual an allowance of alimony *pendente lite,* when awarded to her by those Courts (*d*).

(*a*) See *post,* chap. xxii. (*b*) See 3 Atk. 550. 2 Ves. Jun. 195. 11 Ves. 18. 19 Ves. 397. 5 Madd. 156, 415. (*c*) See *ante,* p. 275. (*d*) See *post,* chap. xxii.

thus, Courts of Equity do not infringe upon the jurisdiction of the Ecclesiastical Courts, to which belongs the right of decreeing alimony, as consequential to a sentence of a divorce *à mensâ et thoro ;* but they exercise their authority over the equitable property of the wife, in such a manner as to do that justice to her and her family, which her husband, in breach of his duty, refuses to perform.

Accordingly, in *Oxenden* v. *Oxenden* (*a*), by articles on the marriage of *A* with *B*, her husband, 6000*l.*, part of her fortune, were agreed to be laid out in lands, and settled upon *B* for life, then on *A* for life, &c. The money was left in the Bank till the purchase could be made, subject to the trusts. *A* being obliged to leave *B*, in consequence of his cruel and unhandsome treatment, filed her bill for a performance of the marriage contract, and to have an allowance for maintenance ; and a cross bill was filed by *B*, to have the money placed at interest until a purchase could be made. The ill treatment of the wife having been fully proved, the Court decreed the 6000*l.* to be laid out, with her consent, in a purchase, and settled pursuant to the articles, and the *interest* in the mean time to be paid to her, *so long as she lived separate.*

In this case it is observable that the Court deprived the husband of the interest of his wife's fortune, although it was directed by the articles to be paid to him for life (*b*).

In *Watkyns* v. *Watkyns* (*c*), there was strong and substantial evidence of the wife having been cruelly

---

(*a*) 2 Vern. 493. Pre. Ch. 239. Gilb. Eq. Rep. 1, S. C.
(*b*) This decision, in giving the wife a provision out of that which belonged to the husband by contract, could scarcely be supported at this day. See 2 Ves. Jun. 198. (*c*) 2 Atk. 96. To the same effect see Nicholls v. Danvers, 2 Vern. 671. Williams v. Callow, 2 Vern. 752. Sleech v. Thorington, 2 Ves. Sen. 562. Atherton v. Nowell, 1 Cox's Rep. 229.

and barbarously used by her husband, who had quitted the kingdom after having possessed himself of the greatest part of her fortune; and *Lord Hardwicke*, after directing it to be ascertained how much of her property remained in specie, ordered it to be placed out at interest, and such interest to be paid to the wife until her husband returned and maintained her as he ought to do. Again—

In *Wright* v. *Morley* (*a*), the husband went abroad and left his wife unprovided for, she being intitled to the interest of 4000*l.*, *five per cents.* for life; he having previously, with her concurrence, assigned part of the dividends to secure the payment of an annuity granted by him in consideration of 600*l.*; and the Court ordered the remainder of the dividends to be paid to the wife, *for her separate use*, during the absence of her husband, subject to the inquiries directed by the Court, viz. whether the husband lived abroad, and had made no provision for her; which were not proved at the hearing.

And husband's fraudulent assignment will not defeat wife's title to maintenance.

The Court will not permit this equity of the wife to maintenance out of her own fortune to be defeated by any trick or contrivance of her husband. If, therefore, as in *Colmer* v. *Colmer* (*b*), he (with a view of deserting her, which he afterwards carries into effect) make a fraudulent conveyance of his own and her property to pay debts where there are none, or a conveyance to pay debts which he owes (*c*), the transaction will not prejudice her right to maintenance, but the Court will follow her property into the hands of the trustees, and order her an allowance suitable to her fortune and the circumstances of her husband, although it may be necessary, in order to effect that purpose, to have resort to part of his property so vested in trust.

Since the Court will appropriate, as it has been

(*a*) 11 Ves. 12, 23. (*b*) Mos. 113. (*c*) See *ante*, page 225.

shown, the wife's equitable property for her support, when she has been deserted by her husband, and obliged to leave him from his improper conduct towards her, if a person advance her money for her maintenance, under the above circumstances, the Court will repay it to the creditor out of her estate.

Her creditor for advances for her support, will be intitled to repayment out of her equitable property.

Thus in *Guy* v. *Pearkes* (*a*), it appeared that the wife was unprovided for, that her husband went to sea and totally deserted her, that after going to sea and returning, he did not cohabit with her, nor afford her any support; that he afterwards went to the *East Indies*, and had not since been heard of, and that it was unknown whether he were living or dead. It also appeared that *A* had made advances to her of 30*l.* a year during the above period, which were her only support. Application was made to the Court, in a cause, that so much of the wife's stock, standing in the Accountant-General's name, as would raise 210*l.*, might be sold, and the proceeds paid to *A*, in satisfaction of his debt; also a further sum of 50*l.*, to be paid to the wife, and that the dividends upon the remaining fund might be paid to her for her future support. *A* made an affidavit that he was induced to make the advances upon the faith of being repaid them out of the above property. In granting the application, *Lord Eldon* thus expressed himself; "I have a strong impression upon my mind, that this has been done; and, independently of precedent, I think the Court may do it, as the husband deserting his wife, leaves her credit for necessaries, and would be liable to an action; and although execution could not be had against the *stock*, the effect might be obtained *circuitously*, as he could not relieve himself except by giving his consent to the application of this fund." But—

3. If the husband be willing, and offer to maintain

(*a*) 18 Ves. 196.

his wife, and she, without sufficient reason, refuse to reside with him, and he applies for the interest of her fortune, although she may resist the application, the Court will order payment of it to him, notwithstanding he decline to make a settlement upon her (*a*).

But her improper refusal to live with her husband will bar her right to a maintenance out of her own property, and he will be intitled to receive the interest.

Accordingly, in *Bullock* v. *Menzies* (*b*), *A*, the wife of *B*, being intitled for life to the interest of a considerable sum of money, petitioned the Court in a cause then pending, for an order (which was made) for payment of a yearly sum out of such interest, for maintenance, as her husband, an officer, was abroad with his regiment. The husband afterwards returned to *England*, and petitioned that the allowance should be paid to him; and stated, that although he was willing to receive his wife, she *refused* to live with him. This petition was resisted by her; and, in consequence, the order upon her petition was discharged. The wife afterwards presented another petition for payment of the same allowance; which was dismissed, because the property was her husband's, in her right, who was desirous to support her and himself with the fund, and was only prevented from so doing by her refusal to live with him.

In the last case, it is to be remarked, that no misconduct whatever was imputed to the husband; he had not used his wife cruelly, nor deserted her, except so far as he was obliged to leave her for the sake of serving his country. He had a right therefore to the society of his wife upon his return to *England*, as also to all those benefits which the law gives to a husband in the property of his wife. The wife, therefore, had no reasonable ground for refusing to cohabit with her husband, and failed in making out a case for the interference of a Court of Equity with the legal rights of her husband.

(*a*) 4 Ves. 15—20. (*b*) 4 Ves. 798.

But when the husband is *originally* in fault, and obliges his wife to leave him, then whether his offer to receive and maintain her will be sufficient to intitle him to the interest of her property, seems to depend upon the circumstances of each case. Suppose the Court, upon a case of abandonment or cruelty being made out against the husband, to decree to the wife a sufficient maintenance out of her equitable property, and afterwards he is desirous in sincerity, to the satisfaction of the Court, to be reconciled to her, and offers to receive and to treat her affectionately; but she refuses to accede to such offer, and to return to him, probably such a refusal would induce the Court to discontinue her allowance upon some such principle as the following: that whilst the husband disregards his duty to his wife, and ceases to protect and support her, the Court will maintain her by means of her own property within its jurisdiction; but when the husband shows real penitence and a desire to be reconciled, and is anxious to return to his duty, and to make all amends in his power for his past misconduct, if his wife be perverse, and frustrates those good intentions, the Court will withdraw its protection, and stop her allowance. In so doing, it endeavours to promote peace and reconciliation, and to prevent a perpetual separation between man and wife (*a*).

Contra, as it would seem, if he was the cause of her leaving him, and his offer to receive her be artful and insincere.

Observations upon this point.

The Court, however, will not suffer the wife to be the dupe to a mere offer of cohabitation and reconciliation artfully made by her husband, in order to procure the interest of her fortune, and to obtain a discontinuance of the allowance made to her for a separate maintenance.

Accordingly, in *Watkyns* v. *Watkyns* (*b*), it was in evidence that the husband received great provocation from his wife, and, upon his remonstrance, that she

---

(*a*) See Head v. Head, 3 Atk. 296. (*b*) 2 Atk. 97.

became passionate and left his house, that he followed and intreated her to return, and offered to forget every thing which had passed; but it may be observed that this offer was suspicious; it was momentary, immediately after she had left him, who, it was proved, had cruelly treated her. It was probable that the offer proceeded from other motives than a sincere desire of reconciliation; besides, the husband had commenced the ill treatment of his wife before their marriage, by deceiving her, in causing a void legal security to be prepared and to be accepted by her, when she had intrusted him to prepare a proper one, for securing to her a sum of money in the event of her being the survivor; and his conduct upon her refusal to accept the offer, and under colour of it, was immediately afterwards to break open her cabinet and possess himself of the bond which he had prepared as above. Under all these circumstances of suspicion, it is presumed that the evidence on the part of the husband did not influence *Lord Hardwicke*, for he made the wife an allowance for maintenance out of her fortune, as appears from this case, before stated (*a*).

And in *Atherton* v. *Nowell* (*b*), the husband had also begun his frauds upon the wife before the marriage, by inducing her to marry him upon the *false* representation of his being a person of fortune, when in fact he was then greatly indebted, and was shortly after the marriage sent to prison, where she resided with him, and endured severe hardships, which were the consequence of her marriage solemnized under the above false representation. It also appeared that the husband, after liberation from his first confinement, was again sent to prison for a considerable debt, and where he then remained; that there was only one child of the marriage living, and to support whom and herself she was put to great difficulties; that her husband had

---

(*a*) Page 280. (*b*) 1 Cox's Rep. 229.

refused to contribute to their support, *requiring* her to live with him in prison, or to be at his *mercy* for such occasional support as he might think proper to bestow; and that from his behaviour to her, as well as on account of her own health, she was *afraid* again to live with him in prison. Under these special circumstances, the Court ordered, upon cross petitions presented by the husband and wife, (the former praying that the *interest* of the wife's fortune might be paid to him, and the latter for an allowance for maintenance), that 50*l.* cash in the Bank should be paid to the wife for her separate use; and directions were given to a Master to inquire into the circumstances and situations of the families of the husband and wife, with a view to a settlement of her fortune, &c.

On husband's insolvency, maintenance allowed to the wife out of her trust property.

[On the same principle on which separate maintenance is given to the wife, when deserted by her husband, the Court will also, if from bankruptcy or insolvency he becomes unable to provide for her, fasten on her trust property the obligation of maintaining her; and, therefore, in such cases, where her property consists of a principal fund, the part of it which is settled on her and her children is given to her separate use for her life (*a*), and where her property consists of a life interest, an allowance for maintenance is in like manner given to her separate use. But where the husband had assigned his wife's life interest in a trust-fund to a purchaser, and afterwards became bankrupt, it was held that the wife was not intitled to a provision as against the purchaser, the assignment having been made to him while the husband was maintaining his wife, and, therefore, before the circumstances had given any present equity to her (*b*).

The wife's right to a maintenance in case of her husband's desertion, or of his inability to maintain her,

---

(*a*) See *ante*, 277.

(*a*) Elliott v. Cordell, 5 Madd. 149.

applies to the same descriptions of property as her general right to a settlement, *i. e.* to her choses in action, which are in their nature equitable, or which are recovered in equity, and also to her life interest in such property. She is intitled to this provision out of the rents and profits of lands in which she has an equitable estate of freehold (*a*).

Amount of maintenance allowed to wife.

The amount of the allowance to be made in these cases is not governed by any fixed rule, but, like the amount to be set apart when a permanent settlement is to be made, depends upon all the circumstances. Where the property consists of a principal fund, one-half has most commonly been settled, the wife being allowed the interest of it (*b*). But the allowance given out of a life interest has often been more liberal. In *Oswell* v. *Probert, Lord Alvanley* disapproved of an equal division between the wife and the husband's assignees, observing that half an income is not a maintenance (*c*). In two instances in bankruptcy the whole of the wife's life interest was allowed to her (*d*). In *Wright* v. *Morley, Sir William Grant* thought that these decisions went too far: in that case the husband had granted an annuity of 100*l.* per annum out of his wife's life interest in 260*l.* per annum, and had subsequently deserted her. The remaining 160*l.* per annum was allowed to the wife.

This allowance to the wife for maintenance will not be made, if she is already in possession of an adequate provision for her separate use, derived from another source (*e*).]

Her adultery or elopement a bar.

4. As to the effect of the wife's misconduct upon her equity for a maintenance;—it is a trite observation that persons appealing to a court of justice ought to

---

(*a*) Burdon v. Dean, 2 Ves. Jun. 607. (*b*) *Ante,* p. 260. (*c*) 2 Ves. Jun. 683. (*d*) Vandenanker v. Desbrough, 2 Vern. 196. Exparte Coysegame, 1 Atk. 192. (*e*) Aguilar v. Aguilar, 5 Madd. 414.

enter it with clean hands, *i. e.* they must be objects worthy and proper to receive the redress which they seek; hence it follows, that if the wife have been guilty of gross misconduct, a Court of Equity will not consider her to be a person intitled to its protection. If, therefore, she had committed adultery, or had eloped from her husband without a sufficient reason, and these facts were properly put in issue and proved, the Court would remain passive, and not interfere at her suit to allow her a maintenance out of her equitable property (*a*).

(*a*) Vide *supra*, p. 275.

CHAPTER VIII.

In the fifth and sixth chapters it was shown that marriage was not an absolute gift to the husband of his wife's choses in action, but that the law gave him the power of making them his own, either by receipt or by assignment of them for value, or by a release of them. There yet remains to be considered, under the same title, another mode by which the husband may acquire the sole and absolute interest in his wife's equitable choses in action, whether immediately recoverable or in expectancy, although she survive him, viz. by making a valid settlement upon her; which subject it is proposed to consider in this chapter, as follows:—

I. *Settlements made* before *and in contemplation of marriage.*
   1. *When they will intitle the husband to his wife's choses in action, although she be the survivor; and when he, or the persons claiming under him, will be obliged to perform his covenants or agreements, in order to intitle them to such property.*
   2. *Of the validity of ante-nuptial settlements against purchasers and creditors as connected with the husband's title as a purchaser of his wife's equitable property.*

II. *Settlements made* after *marriage.*
   1. *Their effect in intitling the husband to his wife's choses in action in prejudice to her title by survivorship.*

I. Settlement made before and in contemplation of marriage.

Husband intitled to wife's choses in action under an antenuptial settlement containing an agreement for that purpose.

1. The husband may intitle himself to all his intended wife's personal estate, whether in possession or in action, or which she may afterwards acquire, by becoming a purchaser of it by a settlement made upon her previously to and in contemplation of the marriage (*a*). The principle is equality, viz. that as the wife has consented to accept a *certain* provision by settlement, so her husband, in consideration of his assent to it, shall be intitled to receive the whole of her fortune.

But a *mere settlement* upon marriage will not intitle the husband to the whole of his wife's fortune. There must be an *agreement* for the purpose, either *expressed* or *implied*; for if the stipulation be for a *part* only of her property, that necessarily excludes the residue; or if the agreement extend to the whole of the fortune she was *then* intitled to, her husband will not be intitled to any personal estate which may accrue to her during the marriage. And, it is presumed, that adequacy or inadequacy of the provision is a consideration so indeterminate and capricious, that the Court will not take that circumstance into consideration, when nothing appears, from the settlement, of any agreement or contract that the husband should, in consideration of it, be the purchaser of, or intitled to the whole of his wife's property, or what she may in future become intitled to during the marriage (*b*).

It is conceived that the cases, or at least the modern ones, authorise the above conclusions. I am aware, however, that in *Blois* v. *Hereford* (*c*), a provision by settlement was made for the wife, and no notice was taken of her personal estate; and yet a decree was made, in favour of her husband's representative, against her

---

(*a*) For a form of such a settlement, see vol. 2, Append. 7.
(*b*) 2 Atk. 448. (*c*) 2 Vern. 501.

title by survivorship; the *Lord Keeper* observing, that in all cases where there was a settlement equivalent to the wife's portion, it was to be intended that the husband was to have the portion, although there was *no agreement* for the purpose. But this decision was shaken by Lords Commissioners *Bathurst* and *Aston*, in the case next stated, who observed that this was a *strange report*. And in *Druce* v. *Dennison* (*a*), *Lord Eldon* said, that according to the *modern* cases, it is established that the settlement, to be the purchase of the wife's fortune, must either *express* it to be for that consideration, or the contents of the settlement altogether must import that, and *plainly* import it *as much as if it were expressed*; that such was the result of the cases upon the subject, and that it was not worth while to consider in what respect the *older* cases were unsatisfactory; *involving inquiries not very easy to execute*.

The case before the Lords Commissioners was to this effect (*b*):—The wife was intitled to a rent charge of 300*l*. under her marriage settlement, and she having survived her first husband, took another; but previously to the second marriage a settlement was made, by which, in consideration of such intended marriage, and for providing and settling a competent jointure and maintenance for her, and for making a proper provision for the children of the marriage, certain estates were conveyed to trustees for those purposes. A further settlement was made by the husband of 4000*l*. The husband died *before* the wife; at which time an arrear of 1098*l*. being due in respect of the rent-charge, a question arose, whether the wife was or not intitled to it? And it was determined in her favour, as having survived her husband, upon the principle

(*a*) 6 Ves. 395. (*b*) Salwey v. Salwey, Ambl. 692.

that a *mere* settlement upon marriage was insufficient to raise a gift to the husband of his wife's personal estate, but that in order to intitle him to it there *must* be an agreement, either *express* or *implied*.

In another case (*a*) it appeared that the wife had lands of the value of 700*l*., and also 500*l*. due to her upon bond, which at the time of her marriage remained in her brother's hands. Her husband, before their marriage, made a settlement, and in *consideration of a considerable fortune and portion* with his then intended wife, he granted, &c., but of what *particulars* her fortune or portion consisted, did not appear by the settlement. The question was, whether the bond for 500*l*., being a *chose in action*, and not called in by the husband during his life, was assets in equity to satisfy a debt of the husband, the wife having enjoyed the benefit of the settlement made upon her out of the husband's estate, and which would have been liable to the demand? It was insisted for the creditor, that if the bond debt had been particularly mentioned as part of the consideration for the settlement, there would have been no doubt of its being assets of the husband; for, in equity, the husband is a purchaser of it by making the settlement; and that there was no difference where the consideration was *general* of the wife's portion, especially in this case, where she had nothing but lands besides the bond for 500*l*., so that the bond *must* be taken as the consideration of the settlement (there being none other), and the rather in favour of a fair creditor, who otherwise must lose his debt, and if no settlement had been made, might have had a satisfaction out of the lands. But *per Parker*, Chancellor, "The case is so very clear that the widow's counsel need not to argue it. In this case creditors cannot be in a better condition than the executor of

(*a*) Heaton v. Hassell, 4 Vin. Abr. p. 40, pl. 11.

the debtor; and can it be imagined, that if another person had been made executor to the husband, and such a person had filed a bill against the wife to compel her to assign this bond, that the Court would have decreed for the executor? What the law gives the husband by the intermarriage is a good consideration for making a settlement; but the husband's making a settlement does not vest in him the *choses in action* of his wife, unless it be expressly so agreed between the parties, and *that appears* to be part of the consideration of the settlement, for then the husband is a purchaser, and well intitled to them in a Court of Equity." His Lordship, therefore, decreed that the 500*l.* secured by the bond were not liable to the demand of the husband's creditor. Again,

The husband, having no property of his own, by an obligation given by him to trustees, reciting that *his intended wife's fortune amounted to about* 500*l.*, agreed to pay to her annually 10*l.* for her separate use, and that if he survived her she should have the power to dispose by will of 100*l.*, her wearing apparel, watch, rings, and jewels; but if she happened to be the survivor, then he stipulated to *leave* her 200*l.*, and all her wearing apparel, &c. to be at her sole disposal; and for better securing the premises, he agreed, upon request, to settle lands of the yearly value of 12*l.* The wife being intitled to a debt of 200*l.*, secured by bond given to her *dum sola*, the question was, between the surviving wife and the residuary legatee of the husband, whether this bond debt, as a chose in action, and not reduced into possession by the husband, was the property of her, or of the residuary legatee? And *Lord Talbot* determined in favour of the latter (*a*).

It must be remarked upon the above case, that the husband settled nothing of his own, the provision was

---

(*a*) Adams v Cole, Forrest, 168.

entirely out of the wife's property, and she *agreed* to take a part of it in certainty, rather than to run the risk of losing the whole by her husband's receipt of it during the marriage. Here, therefore, was a contract between them to divide her fortune in manner before mentioned, so that the husband became the purchaser of the bond debt for 200*l.*

In another case (*a*), a woman at the time of her marriage was intitled to 300*l.* as a portion, in her brother's hands, secured by his bond: a settlement of a farm was made upon her for her jointure by the husband's father and grandfather, which settlement was expressed to be made in *consideration of* 100*l.* paid to the grandfather as the wife's marriage portion, which was accordingly paid by the brother. Question, whether the wife, surviving her husband, was intitled to the remainder of the bond debt? And the Chancellor, on appeal from the Rolls, was of opinion in favour of the wife, unless it appeared upon a trial at law, which was directed, that the husband was intitled by *agreement* to the remaining 200*l.*

This case is clearly distinguishable from *Adams* v. *Cole*: there it appeared from the recital that the *whole* of the wife's fortune was the subject of agreement; here it is apparent that the husband stipulated for no more of it than 100*l.*, so that it remained as if no settlement upon the wife had been made.

The following, although a particular case, still establishes what has been before stated, that *contract* or *agreement* is necessary to intitle the husband to his wife's choses in action.

Upon the marriage of *A* with *B*, his wife, a settlement was made in consideration of the marriage, and as well of the then present fortune and portion of *B*,

---

(*a*) Cleland v. Cleland, Pre. Ch. 63.

as the covenants therein after contained to be performed, and for settling a competent jointure upon *B*. One of the covenants was by *C*, *B*'s mother, that she would pay to *A* 200*l*., as an addition to *B*'s fortune. The other covenant was by *B*'s trustees, that *C* would, for the consideration aforesaid, during her life, or by her will, give or bequeath to her daughter *B*, her *executors or administrators, or some child or children of B*, money or lands equal to what *C* should give to her other children. *C* left her a legacy and appointed her executrix. Part of *C*'s *residuary* estate came to *B* by lapse, and *B* survived *A*, her husband. Question, whether the surplus of *C*'s estate that arose either by bequest under *C*'s will, or by accidental intestacy, as by lapse, survived to the wife, or belonged to the husband? which depended upon this, whether, under the above settlement, *A* was to be considered as a purchaser of *B*'s *choses in action* which she might become intitled to during the marriage. And by *Lord Hardwicke*, "The case and the settlement are very particular. The consideration is not merely the marriage and present portion, but further also the covenants contained in such settlement. If the additional 200*l*. in the first covenant had not been paid at the husband's death, his executors would be intitled to it. The other covenant is very particular, and differs from the former as to the covenantees as well as to the persons to whom to be left. Here it is not only to the wife, but also *to any child* of the marriage. How, then, can I say that by this covenant the husband is a *purchaser?* The mother might have left it to the separate use of the wife, or to any children of the marriage, which would have been a performance of the covenant, so that it is *not* a covenant inserted for the *benefit of the husband*, but of the daughter, and the issue of the marriage. Since, then, she might have left it in this manner, and has left part to her daughter, and the other part has come to the daughter by *accident*, and

no contract to give the husband a *certain* right in this at all, it must be considered on the foot of a general legacy to the wife, *abstracted from the contract*; not such as the husband would be intitled to in all events by way of *contract*, but such as must go by the general rules of law and equity by survivorship, according to which, what the husband had reduced into possession will go to his executors, and the rest will survive to his wife (*a*)."

In *Burdon* v. *Dean* (*b*), the wife being intitled to 1000*l.* under her father's marriage settlement, it was prior to her marriage settled thus; 500*l.* of it were to be paid to the husband, and the residue to be settled upon herself and children. The wife being intitled to *other* property, *no notice* was taken of it in the settlement. The husband having become a bankrupt, the question was, whether she was intitled to a provision out of such other property as against the assignees, or was barred by the provision made for her by the settlement? And *Lord Alvanley* decided that the settlement did not bar her right to a provision out of her other property. The reason must have been, that 1000*l.*, part only of the wife's fortune, were in contemplation of the parties when the settlement was made; so that there was no contract or agreement that, in consideration of the husband's relinquishing his legal power over 500*l.*, part of such fortune, he should be intitled as a purchaser to all the residue of it, but to the 500*l.* only, remainder of the 1000*l.* to which the wife was intitled under her father's settlement as above.

In the case of *Lady Elibank* v. *Montolieu* (*c*), before stated (*d*), it appeared that the settlement was not intended to make the husband a purchaser of his wife's

Where the husband is not by con-

(*a*) Garforth v. Bradley, 2 Ves. sen. 675. (*b*) 2 Ves. jun. 607.
(*c*) 5 Ves. 737. (*d*) *Ante*, p. 261.

tract intitled to his wife's fortune, the Court, upon an accession of fortune to her, will order *additional* settlement.

future property, the provision made in it for her being upon the expectation that from circumstances to occur in the family there would be an opportunity for doing better for her at a future period. The wife, therefore, having, after the settlement, become intitled to a considerable share of personal property, the Court ordered at her suit an additional provision to be made for her and her children.

In *Druce* v. *Denison* (*a*), *Lord Eldon*'s opinion coincided with the decision of the Master of the Rolls in *Burdon* v. *Dean*; and his Lordship determined that a settlement by the husband, on his marriage with his wife, in the event of her surviving him, of considerable sums in government securities for her own use, with a covenant to secure to her an annuity for her life, did not intitle the husband to her choses in action to which she was *then* intitled, as the settlement expressed or imported no agreement that by making such provision he should have them; consequently they survived to her, outliving her husband. But he having by his will made bequests in her favour, and treated her choses in action as his own, and bequeathed them as such, as appeared from his *books* and *certain papers* which were given and admitted in evidence, the question terminated in that of *election*, so as to put the widow to elect whether she would give up her choses in action, and take under the will, or whether she would surrender her benefits under that instrument, and retain her own property.

Another case upon this subject is *Mitford* v. *Mitford* (*b*): there it appeared from the settlement, that the wife had given up to her husband a considerable part of her fortune, who in consideration of *such* fortune *covenanted* to make a provision for his wife and children: and *Sir William Grant* said, (what has been proved by the above authorities,) that the mere fact of

---

(*a*) 6 Ves. 385. (*b*) 9 Ves. 89.

a settlement is not evidence that the husband became a *purchaser* of *all* the fortune that might *afterwards* come to the wife; that the settlement in that case appeared to be in consideration of her fortune as specified and described in the deed itself, part of which was settled and part paid to the husband, so that he could not be considered a purchaser of any thing more than the fortune she then had.

Consistently with this doctrine, his Honour decided the case of *Carr* v. *Taylor* (*a*): there the consideration of the settlement was expressed to be the portion or fortune which the husband *would have* or *receive upon his marriage*. The wife afterwards became intitled to a share in the residuary estate of an intestate, part of which consisted of a bond debt due from the husband and his father. The husband having become a bankrupt, the question was, whether the wife was intitled to an *additional* settlement out of the property accrued to her after the date of her marriage settlement; which could not be, if, by such settlement, the husband had purchased for his own benefit all subsequent property to which his wife might become intitled during the marriage. The Master of the Rolls decided, that as the settlement might be construed to mean either the fortune which the husband would actually receive at the moment of the marriage, *or* the rights he would acquire by the marriage, and as the latter intention was *neither expressed nor clearly imported* in such settlement, its operation should be confined to the wife's property at her marriage; so that her husband was not a purchaser of her after-acquired personalty, and consequently that she was intitled against his assignees to an *additional* settlement out of it.

(*a*) 10 Ves. 574. See Beresford v. Hobson, 1 Madd. 371; also the older cases upon this subject, Adams v. Pierce, 3 P. Will. 11. March v. Head, 3 Atk. 720, and Tomkyns v. Ladbroke, 2 Ves. sen. 591.

The several cases last stated appear to establish the following propositions:—

1. A mere settlement in consideration of the wife's fortune intitles the husband only to her *then* property.

That a settlement made before marriage in consideration of the wife's fortune, without saying more, intitles the husband to all her *then* personal property, and *not* to such which afterwards accrues to her.

That if a *part* of her fortune only appear to be stipulated for, the residue which *she then* has, or what may afterwards accrue to her, will not belong to the husband.

2. If a part only be stipulated for, his title will not be carried beyond the contract.

But when it appears from the settlement, that it was the *agreement* between the parties that he should not only have his wife's then present, but all her subsequently acquired personal estate, he will in such cases be intitled to the whole under the marriage contract (*a*).

3. If the contract be for the whole, the husband will be intitled to her then and subsequently accruing property.

And that, in instances where any of the wife's *choses in action* are not purchased by the husband by settlement, they will be subject to her rights of survivorship, and of provision by settlement, which have been before considered.

When husband or his assignees must perform his covenant before he can claim his wife's choses in action.

It must, however, be noticed, that when the husband is a purchaser by settlement of his wife's *choses in action*, if the provision for his wife and children be executory, *i. e.* resting upon his covenant, then neither he nor his assignees will be intitled to recover them in equity until they have specifically performed the stipulations in the settlement (*b*): but upon this subject the following distinction seems necessarry to be attended to; viz. that if the covenant be future and contingent, as that his executors should, after his death, if his wife survived him, pay to her a sum of money, there, as the act to be done in performance of the covenant is con-

---

(*a*) See an agreement to that effect, contained in the form of the settlement, No. 7. in append. vol. ii. (*b*) Pyke v. Pyke, 1 Ves. sen. 376, and see Lister v. Lister, 2 Vern. 68. 2 Freem. 102. Howman v. Corrie, 2 Vern. 190. Holt v. Holt, 2 P. W. 648.

tingent, and may never happen, and his right to her choses in action by purchase under the settlement is immediate and absolute, the Court cannot postpone his title to receive them until he perform such an act as he engaged to do by such a covenant (*a*). But when the husband's covenant to pay or settle amounts to a present and certain obligation, as to do the act immediately or at a fixed period, then the wife has a *lien* upon her own property for the consideration agreed to be given by the husband for its purchase, which must be paid or settled before the Court will take from her such property (*b*).

We shall now proceed to the subject of the validity of *ante*-nuptial settlements against creditors and purchasers; which is a requisite consideration, since if the provision made by the husband be taken away from his wife, his title as a purchaser to her equitable property must fail, and her rights in her own choses in action will remain the same, in regard to him, as if no such settlement had been made.

Settlements before marriage valid against creditors and purchasers.

2. With respect to the validity of ante-nuptial settlements against creditors, &c., it is decided that a settlement, *bonâ fide* made before and in contemplation of marriage, is good not only against the husband, but against his creditors and subsequent purchasers. The efficacy of the consideration of marriage is strongly demonstrated in the following case:—

A, previously to and in contemplation of his marriage with *B*, and in order to make a provision for himself and wife, and with a view of withdrawing out of the reach of his creditors a considerable part of his property, transferred at various times before the marriage into *her* name several sums of stock, and invested monies in *her* name; all of which were stated not to have been

---

(*a*) Basevi v. Serra, 14 Ves. 313. 3 Mer. 674. (*b*) Mitford v. Mitford, 9 Ves. 96.

his own property, but that of other persons who had employed him as a stock-broker, and that the fact was well known to *B*. The marriage took place in the year 1805, and between that year and 1802 preceding, various transactions took place between them by deeds and settlements, containing (as it was alleged) false statements of property belonging to *B* (which in fact never did belong to her), with the intent to defeat the husband's creditors; and that with the like view, sums in stock, amounting to 6200*l*. annuities, were, in the settlement made shortly before the marriage, recited, contrary to the truth, as belonging to her, and the same with other property were settled to her separate use for life, with an absolute power of disposition. *B* having survived her husband, his creditors attempted to defeat the above transactions and settlement upon the ground of fraud, but which was not proved, and was denied by *B*.—*Sir William Grant* (the then Master of the Rolls) decided against the creditors, because it was immaterial whether the stock was, as recited, purchased with the wife's money or not; for, if it were the husband's, he had a right to settle it in contemplation of marriage, which settlement could not be defeated by his creditors; and that the fact of his being indebted at the time, and of *B*'s knowing it, would not affect the validity of the settlements: And his Honour thought, that the mis-recital of the property being the wife's, when it was her husband's, did not necessarily imply fraud, since he might choose to adopt that mode in giving her the property (*a*).

Fraud, however, will vitiate an ante-nuptial settlement; and we shall consider the subject when *real* estates of the husband are settled upon his wife in consideration of his being intitled to receive her equitable property.

(*a*) Campion v. Cotton, 17 Ves. 263.

Statute 27th Eliz. Effect of general powers of revocation in avoiding *ante*-nuptial settlements of lands against purchasers.

The statute of the 27th of *Elizabeth* (*a*) avoids conveyances of lands, tenements, and hereditaments against subsequent purchasers for a valuable consideration, when a general power of revocation is reserved to the settlor. And it was holden in *St. Saviour*'s case (*b*), that notwithstanding the consideration of marriage was a good consideration, yet if a power of revocation were annexed to the settlement, it was void against strangers.

Hence it appears, that if such a power be contained in an ante-nuptial settlement of real property, it will be void against a subsequent purchaser; and the effect will be the same, although the husband had released or extinguished his power before he made the subsequent sale (*c*).

This statute does not extend to personal estate,

But the statute merely extends to "lands, tenements, and hereditaments," and not to personal estate.

The valuable consideration mentioned in the act need not to be money. If, therefore, a person give up a *right* which he had for the property, such surrender would be a valuable consideration within the statute (*d*).

nor to powers of revocation with the consent of other persons, except they be under the influence of the settlor,

When the power of revocation is not general and unqualified, but the exercise of it is made to depend upon the consent of other persons, then if such persons be in the interest or under the control of the settlor, the settlement will be void against a subsequent purchaser, as in *Lavender* v. *Blackstone* (*e*). There the husband reserved to himself a power to make leases of *all* or any part of the premises, with the consent of *A* and *B*, trustees of his own nomination, for any number of years, with or *without* rent; and the Court held the

---

(*a*) Chap. 4. sect. 5. (*b*) Lane, 21, 22. (*c*) 3 Rep. 83, and Bullock v. Thorne, Moor's Rep. 617. S. P. (*d*) Hill v. Bishop of Exeter, 2 Taunt. 69—83, and Ward v. Shallet, 2 Ves. sen. 17. As to the persons who are considered purchasers so as to be intitled to the benefit of this statute, see Sugden on Powers, chap. 8, sec. 2. (*e*) 2 Lev. 146.

reservation to be fraudulent, by enabling him to defeat the settlement *in toto;* the restriction being nothing, as the trustees were of the settlor's own appointment, and therefore to be presumed to act according to his wishes (*a*).

But if the exercise of the power be made to depend upon the consent of persons not in the interest or under the control of the settlor, the settlement will be valid against a subsequent purchaser, as it was determined in *Buller* v. *Waterhouse* (*b*); because such a case is not considered within the meaning of the statute, the settlor not having the sole power of defrauding the purchaser by the exercise of the prior reserved power. Hence the usual powers in settlements to revoke the uses or trusts of the lands, for the purposes of sale and exchange, with a direction that the money should be paid to the trustees to be reinvested (*c*), will not avoid the settlement against a subsequent purchaser of the husband. Neither are powers *bonâ fide* reserved to charge sums of money upon the estate within the letter or meaning of the statute (*d*).

nor to *bonâ fide* powers to charge the settled estate.

We must except, however, such powers of charging, &c. as are reserved fraudulently, as when the husband retains or reserves to himself so large an interest or power over the property as to show the motive of the transaction to have been to defeat creditors or purchasers, for in such cases those powers will be considered as amounting in effect to a power of revocation, and therefore invalidate the settlements containing them (*e*).

Thus, in *Tarback* v. *Marbury* (*f*), the defendant having reserved to himself a power during his life, to

---

(*a*) See Griffin v. Stanhope, Cro. Jac. 454. (*b*) 3 Keb. 751. Jones, 94. See Hungerford v. Earle, 2 Freem. 120. (*c*) Doe v. Martin, 4 Term. Rep. 39. (*d*) Jenkins v. Keymis, 1 Lev. 150—152. (*e*) 3 Keb. 527. 1 Atk. 16. (*f*) 2 Vern. 510.

grant, alien, or otherwise dispose, at his will and pleasure, of the estate comprised in the deed; the Court held, that as the defendant might have *charged* it to the *full value*, the reservation amounted in effect to a power of revocation, and therefore that the settlement was fraudulent.

Contra, if these powers be merely colourable.

But it appears from the case of *Jenkins* v. *Keymis* (*a*), before referred to, that if such a power to charge the property be fairly reserved, and, from the magnitude of the sum when compared with the value of the estate, no presumption of fraud arises, it will not defeat the settlement at the instance of a purchaser.

The subject next proposed to be considered was,

II. Settlements made *after* marriage.

Settlements *after* marriage.

1. The settlements which have been under consideration were those only that were made previously to marriage, at a period when the parties were able to contract with each other. If, then, as it has been shown, *actual* agreement or contract be necessary to give to the husband his wife's choses in action, in consideration of the provision made by him for her, it appears to be a necessary consequence, that a settlement made *after* the marriage by the husband upon his wife, even upon an accession of fortune to her (not given to her separate use and disposition), where the transaction is *between themselves only*, and no father, guardian, or Court acts for her, will not constitute the husband a purchaser of such additional fortune, but the wife's title by survivorship will prevail.

Thus in *Lannoy* v. *Duke and Duchess of Athol* (*b*), it appeared that the husband, by a second settlement, made during the marriage, in consideration of a large sum of money to which the wife became intitled upon her father's death, in addition to securing a rent charge to her included in the first settlement, provided 6000*l.*

(*a*) 1 Lev. 150—152. (*b*) 2 Atk. 448. Ed. by *Sanders*.

for the portions of daughters in default of issue male, so that there was no provision for the wife other than what she was intitled to under the first settlement. The wife having survived her husband, the question was, whether the second settlement intitled his representatives to the accessional fortune of the wife? And *Lord Hardwicke* decided that it did not, first, because there was in fact no additional provision made for her by it, and that the portions for daughters had nothing to do with the general rule of a settlement equivalent to the fortune the father had with the mother. And, secondly, and chiefly, as his Lordship expressed himself, because there was *no contract* on the part of the wife, *who was herself incapable of contracting*, and had neither father nor guardian to contract for her.

It is true that, in *Sykes* v. *Meynal* (*a*), the second husband, after marriage, made a settlement upon his wife; and *Sir Thomas Clarke* decreed, that her husband was intitled by it to a mortgage debt owing to her, and not reduced into possession during his life, although she was the survivor. His Honour referred to two cases as warranting the decree, one of which was that of *Lannoy* v. *Athol*, just stated, but which, it is pre-

---

(*a*) 1 Dick. 368. The wife was intitled to a mortgage under the will of her first husband. Her second husband, after the marriage, settled on her for life, by way of jointure, lands valued at 400*l.* per annum. The settlement was recited to be in consideration of the marriage, of his love and affection for her, and of a marriage settlement previously made of lands belonging to her, and of a very considerable fortune had and received by him with her in monies and securities for money. After his death she entered upon the jointure lands, and she and her third husband continued in the possession of them. Reg. Lib. B. 1762, fo. 440; the decree is entered under the name of Sikes v. Holden. The circumstance that the wife enjoyed the jointure expressed to be made in consideration of her fortune distinguishes this case from that of Lannoy v. Duke of Athol, where no additional provision was made for her. The wife, electing after her husband's death to accept benefits given by the settlement, is of course bound to confirm it in other respects.

sumed, has a contrary tendency. The other case was, *Jones* v. *Marsh* (*a*), which seems to be equally inapplicable, the question in it being, *not* whether the wife could contract with her husband to pass to him her choses in action, but whether a settlement upon her in consideration of an additional fortune coming to her from her mother, was or was not valid against subsequent creditors of the husband. It is therefore presumed, that notwithstanding *Sykes* v. *Meynal*, a settlement *after* marriage will not bind the wife, or intitle her husband to her *choses in action*, except such settlement be confirmed by her after her husband's death (which will be considered in a subsequent part of this work), or unless it be confirmed under a decree in equity during his life, or another settlement directed and approved of, or except the contract were between the husband and her father, or guardian, or trustee acting for her, and the transaction were *bonâ fide* and equitable (*b*).

But such a settlement will be valid if the wife, being the survivor, confirm it, or it be made by decree of the Court.

The principle, I apprehend, is a general one, and not applicable to the particular case. It is this, that, considering the relation between man and wife, and the opportunities which he has of practising upon her affection and fears, so as to take undue advantage, the law throws around her a shield of protection, and disables her from contracting personally with him relative to her property, except according to the forms which it has prescribed (*c*).

This, however, must be confined to cases where the wife is not placed in the character of a *feme sole* in relation to her property, for in that character (as it will be afterwards shown), she may dispose of it as she thinks proper, and contract concerning it with her hus-

---

(*a*) Forrest. 64. (*b*) It does not appear that the sanction of the wife's father, guardian, or trustee, could give any additional effect to the settlement as against her in the event of her surviving. See Stamper v. Barker, 5 Madd. 157. (*c*) See 2 Ves. Sen. 17.

band, for his and her benefit, as she pleases, subject to questions of validity as to imposition, &c. as arise on the like transactions between man and man in general.

To such the wife's power only, it is presumed that *Lord Eldon*'s observation applies in *Lady Arundell* v. *Phipps* (*a*). In which case his Lordship, alluding to that of *Dewey* v. *Bayntun* (*b*), said, "From the only account I have had of this case, it appears to have been asserted that a husband and wife could not, after marriage, contract for a *bonâ fide* and valuable consideration for a transfer of property from him to her or trustees for her. The doctrine is not so either *here* or at *law*." The contract in both cases was a purchase by the wife with her separate property, or over which she had a sole and separate power of disposition, of ancient pictures, furniture, and other articles of great value belonging to her husband; and on the question of its validity against the husband's creditors, *Lord Eldon* expressed himself as above.

As to validity of *post*-nuptial settlements against creditors, husband, &c.

2. This leads to the second consideration, viz. when a settlement made by the husband *after* the marriage upon his wife and children, will or will not be good as against his creditors; for such a settlement is obligatory upon himself, and all persons claiming as volunteers from or through him (*c*).

Such settlements will be binding if made in pursuance of articles or letters written prior to the marriage.

It is scarcely necessary to observe, that when the settlement is made after, but in pursuance of written *articles* entered into, or letters written, *before* the marriage, such settlement is unimpeachable by any persons, whether they be creditors or subsequent purchasers; for the contract of marriage is a *valuable* consideration, and establishes the settlement against every one (*d*); but if the agreement *before* marriage be *verbal* only, and the settlement *after* marriage be made in pursuance of it,

---

(*a*) 10 Ves. 148. (*b*) 6 East, 257. (*c*) Watts v. Bullas, 1 P. Will. 60. Brookbank v. Brookbank, 1 Eq. Ca. abr. 168. pl. 7. Bale v. Newton, 1 Vern. 464. (*d*) Bovye's case, 1 Ventr. 193.

whether such agreement will support the settlement against creditors appears to be undecided. It is however presumed, that such a promise would not support the settlement against creditors, because the statute of frauds is express, that no action shall be brought whereby to charge any person upon any agreement made in consideration of marriage, unless some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorised (*a*). Against which enactment it is conceived, that the doctrine of *part performance* by the subsequent marriage could not be admitted to take the case out of the statute (*b*).

But presumed not so if the prior agreement be parol.

Such appear to have been the opinions of *Lord Thurlow* and *Sir William Grant*, in *Dundas* v. *Dutens* (*c*), and *Randall* v. *Morgan* (*d*).

(*a*) 29 Ch. 2. c. 3. s. 4. (*b*) 1 Ves. Jun. 199. 3 Bro. C.C. 401.

(*c*) But in this case, according to Mr. Cox's report, Lord Thurlow was clearly of opinion, that a settlement made after marriage, in pursuance of a parol agreement before the marriage, was not to be reckoned fraudulent against creditors. See also 1 Strange, 237. 4 East, 207. In Dawson v. Ellis, 1 Jac. and Walk. 524, it was argued that if a man first contracts verbally to sell his estate to *A*, and then contracts in writing to sell it to *B*, and afterwards conveys it to *A*, in pursuance of the first contract, *A* having at that time notice of the second contract, *B* would not be able to call on *A* for a conveyance. It was contended that the statute of frauds did not nullify the verbal contract, but only took away the remedy for enforcing it; that it might therefore still be used for the purpose of defence, and that the circumstance of the second agreement being in writing gave it no superior equity over the first, when the legal estate had been conveyed in pursuance of it. This reasoning was sanctioned by the Master of the Rolls: it derives support from analogy to the construction put upon the statute of limitations, which, though barring the remedy, leaves the debt subsisting for some purposes; and also from the rule hitherto prevailing, that in cases within the statute of frauds, as well as in those within the statute of limitations, relief may be given, unless the objection be

---

(*d*) 1 Ves. Jun. 196. 2 Cox. 235. 12 Ves. 67.

Unless by fraud of the husband he prevents the agreement from being reduced into writing.

If indeed the husband have been guilty of *fraud*, and the case does not merely rest on the parol promise, the fraud will take the case out of the statute, and then the settlement will be obligatory (*a*); as if the husband secretly countermanded the instructions which he had given for drawing a settlement, and then induced his wife to marry him (*b*).

And when the agreement before marriage rests upon letters or notes, the terms and obligations of the parties must appear from them, so as to manifest their intentions: this appears from the case of *Randal* v. *Morgan*, before referred to, and the cases there collected.

A post nuptial settlement is void against *purchasers* for value even with notice.

But when the settlement is *after* the marriage, and it is expressed to be made in consideration of the marriage only, the contract of marriage, being completed, ceases to be a valuable consideration; such a settle-

---

insisted on in the pleadings: if a verbal contract were merely void, it could not be the foundation of a decree. Since, however, it is now considered that the statute of limitations (Foster v. Hodgson, 19 Ves. 180), and as it seems the statute of frauds (Redding v. Wilkes, 3 Bro. C. C. 400. Rist v. Hobson, 1 Sim. and Stu. 543) may be taken advantage of by demurrer, it is perhaps doubtful whether this rule will be followed in all cases; for no relief can in general be given at the hearing when the Bill is open to a demurrer on the merits as stated in it. And the tendency of late decisions has been to treat verbal contracts as void for all purposes, whether the parties do or do not object. Rose v. Cunnynghame, 11 Ves. 550. See Buckmaster v. Harrop, 7 Ves. 341. 13 Ves. 456. Gaskarth v. Lowther, 12 Ves. 107. In a recent case it appeared that a verbal contract was entered into for the sale of the next presentation to a living then full; but it was not reduced into writing until after a vacancy had occurred by the resignation of the incumbent; the question was whether the transaction was affected with simony, and the Lord Chancellor said that it clearly could not stand, if there was no binding contract at the time when the vacancy occurred, and therefore declined to enforce it. Marquis Townshend v. Bishop of Norwich, 17th Aug. 1821. Reg. Lib. B. 1820, fo. 1791.

(*a*) Montacute v. Maxwell, 1 P. Will. 620. 1 Stra. 236. Prec. in Ch. 526. (*b*) 1 Eq. Ca. Ab. 20, pl. 4. Ch. Pre. 526. 1 Ves. Jun. 199. 2 Bro. C. C. 565.

ment then is merely *voluntary*, although the consideration is moral and meritorious. Against *purchasers*, therefore, such a settlement is absolutely void, whether they had or had not notice of it at the times of their purchases; for the statute of the 27th of *Elizabeth*, chap. 4, makes all voluntary settlements null and void against *purchasers* for *valuable* considerations; at least the cases have decided that it has such an effect (*a*).

Thus in *Buckle* v. *Mitchell* (*b*), *A* made a voluntary settlement of an impropriate rectory upon his sister *B*, and her children; *A* afterwards agreed to sell to *C*, for a valuable consideration, some of the tithes belonging to it, but died before the contract was completed; *C* therefore filed his bill for a specific performance, against the persons claiming under the settlement. *C* had notice of the settlement at the time the agreement was made; nevertheless the Court decreed a performance of the contract, upon the principle that under the act of the 27th of *Elizabeth*, the settlement was absolutely void against *C*, a purchaser for *valuable* consideration (*c*).

But such voluntary deeds only as are fraudulent are void against *creditors*.

The act of the 13th of *Elizabeth*, chap. 5, does not make void *voluntary* settlements against *creditors*; but merely declares, that a *fraudulent* deed shall be void against them. Hence it seems to follow, that although a man be indebted at the time he made a voluntary

---

(*a*) Gooch's case, 5 Rep. 60 *b*. Cowp. 710. Evelyn v. Templar, 2 Bro. C. C. 148. Humphreys v. Moses, 2 Blackst. Rep. 1019. (*b*) 18 Ves. Jun. 100. See also Otley v. Manning, 9 East, 59, where all the cases are considered by Lord Ellenborough; and Pulvertoft v. Pulvertoft, 18 Ves. 84. (*c*) In a subsequent case, Smith v. Garland, 2 Mer. 123, it was held that the party who had made a voluntary settlement was not intitled to the assistance of a Court of Equity to compel the performance of a contract subsequently entered into by him for the sale of the estate. See Johnson v. Legard; Sugden on Vendors and Purchasers, p. 570, 5th edition, in which case the decree has been reversed by the Lord Chancellor on appeal.

settlement, yet it is no further void on that account, than as affording a *presumption* of fraud (*a*).

This principle will serve as a guide to the understanding of the cases, and the distinctions which have been made; the conclusions to be drawn from which I shall endeavour to collect, and state them shortly.

Therefore debts subsequently incurred, will not defeat a post-nuptial settlement.

If the husband, when he makes the settlement after marriage upon his wife, be not indebted at the time, subsequent debts will not defeat it: upon this point *Lord Hardwicke*, in *Townshend* v. *Windham* (*b*), thus expressed himself; "If there be a voluntary conveyance of real estate or chattel interest by one not indebted at the time, although he afterwards becomes indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors, that will be good (*c*); but if any mark of fraud, collusion, or intent to deceive subsequent creditors appears, that will make it void, otherwise not; but it will stand, though afterwards he becomes indebted (*d*)."

Recital in a settlement *after* marriage of *ante*-nuptial articles, not binding upon creditors.

Upon this principle, *Sir Thomas Plumer*, M. R., decided the case of *Battersbee* v. *Farrington* (*e*), his Honour observing, that a voluntary conveyance by a person not indebted, was clearly good against future creditors.

In that case the settlement contained a *recital* that it was made in pursuance of articles entered into before the marriage, but they were lost; and whether the recital would be evidence against creditors, so as to establish the deed against them, was considered by his Honour, who stated the distinction to be, that against

---

(*a*) 1 Atk. 15. Lord Teynham v. Mullins, 1 Mod. 119. 2 Ves. Sen. 10. See also Partridge v. Gopp, 1 Eden, 163—166, and Holloway v. Millard, 1 Madd. 414—419. (*b*) 2 Ves. Sen. 11. (*c*) 1 Atk. 93. Middlecome v. Marlow, 2 Atk. 519. 2 Bro. C. C. 90. (*d*) 12 Ves. Jun. 155. (*e*) 1 Swanst. 106—113.

all persons claiming under the settlor, the recital was conclusive (*a*); but that it would be difficult to maintain that a recital in a *post*-nuptial settlement of *ante*-nuptial articles, of the existence of which there was no distinct proof, would be binding upon creditors; for that such a doctrine would give to every trader a power of excluding his creditors, by a recital in a deed to which they were not parties (*b*).

If the husband happen to be indebted at the time of making the settlement, the principle of presumption before stated, furnishes the following distinctions;—

If his debts be *considerable* (*c*), and the effect of the settlement would be, if substantiated, to defeat the creditors of their demands, then such settlement is void as fraudulent, under the act of the 13th of *Elizabeth* (*d*).

Nor will the settlement be void unless the debts owing at the time of making it be of considerable amount.

But it would not be so, it is presumed, if the debts were of *inconsiderable* amount; because their existence furnishes no presumption of the settlement having been made with an intent to deceive and defraud creditors; and common sense would revolt at a decision that a voluntary settlement made by a husband having a rental of 5000*l.* a year, should be void, if it happened, that when he made such settlement he was indebted in the trifling sum of 100*l.* This point came under *Lord Alvanley*'s consideration in *Lush* v. *Wilkinson* (*e*).

And its validity will depend upon the settlor's being in solvent circumstances at the time of making it.

In that case, the husband, at the period of making the settlement, was indebted in two sums, secured by mortgages, and in about 100*l.* and no more, as appeared from the wife's answer; as also that none of such debts were owing at his death, and that he was neither insolvent when he made the settlement, nor at his decease. This settlement was attempted to be impeached

---

(*a*) See Willes's Rep. 11, 12. (*b*) See Anon. Prec. in Ch. 101. Wilson v. Pack, ibid. 297. (*c*) Twine's case, 3 Rep. 81 *b*. (*d*) Beaumont v. Thorp, 1 Ves. Sen. 27. (*e*) 5 Ves. 384. See also 1 Madd. Rep. 421.

by a *subsequent* creditor, upon the ground of its being voluntary, and therefore void against creditors, the bill charging insolvency in the husband at that time, and that he was then indebted to several persons; but which statements were negatived by the widow as above. His Honour said, that in order for a subsequent *creditor* to obtain a *reference* for inquiry into *prior* debts, for the purpose of invalidating a voluntary settlement, he doubted whether such a reference ought to be made, except upon proof of one antecedent debt; and he further observed, that in *Stephens* v. *Olive*, *Lord Kenyon* seemed to think that without an antecedent debt *proved*, there was no such right; that a *single* debt would not do, since every man must be indebted for the common bills of his house, although he pay them every week, and that the validity of the settlement must depend upon this, viz. whether the settlor were in *insolvent* circumstances at the time. The creditor's bill was dismissed.

Although the debts be considerable, if secured by mortgage, they will not affect the settlement.

Suppose the settlor to have been considerably indebted when he made the settlement; if, however, such debts be firmly secured, as upon mortgages, the mere fact of the husband being indebted, will not vitiate the settlement; because the payment of the debts then owing having been duly provided for, so as not to be evaded in any manner by the husband, the mere circumstance of their being in existence and unsatisfied at the date of the settlement, raises no presumption whatever that such settlement was made to evade or prevent the discharge of them (*a*); so also, when the presumptive fraud, from being largely indebted, is repelled by the settlement itself providing for the payment of the debts, such settlement will be good against subsequent creditors (*b*).

Nor if the settlement provided for the payment of them.

(*a*) 2 Bro. C. C. 90. 92, also see 1 Madd. 418.
(*b*) 9 Ves. 194. Nunn v. Wilsmore, 8 Term Rep. 521.

It is presumed that *subsequent* creditors can only affect the voluntary settlement through the medium of debts owing by the settlor *at the time* when such deed was made. It is, therefore, a necessary consequence, that if the prior debts are such as would not defeat the settlement, subsequent creditors cannot by proof of them invalidate the deed.

Upon this subject *Sir William Grant*, in *Kidney* v. *Coussmaker* (*a*), thus expressed himself: "Although there have been much controversy, and a variety of decision, upon the question whether such a settlement be fraudulent as to any creditors except such as were creditors at the time, I am disposed to follow the latest decision, that of *Montague* v. *Lord Sandwich* (*b*), which is, that the settlement is fraudulent *only* as against such creditors as were creditors at the time (*c*)."

(*a*) 12 Ves. 136—155. (*b*) Ibid. p. 148.

(*c*) This must probably be understood to mean that subsequent debts will not invalidate the settlement, where it does not appear from other circumstances that the intention was fraudulent; for the authorities seem to establish that a voluntary settlement may be invalidated as well upon evidence indicating a fraudulent object, as upon evidence of debts existing at the time, and that if it be found to be invalid upon either ground, the subsequent creditors are let in to share the benefit of the decree. Walker v. Burrowes, 1 Atk. 93. Fitzer v. Fitzer, 2 Atk. 511. Taylor v. Jones, ibid, 600. Montague v. Sandwich, 12 Ves. 156 *n*. And see 2 Ves. Sen. 10. 2 Atk. 481, *post*. p. 317. In Lush v. Wilkinson, 5 Ves. 384, it was doubted whether subequent creditors could file the bill for the purpose of impeaching the settlement, but if they are intitled to participate in the property in the event of the settlement being found to be fraudulent, there seems no reason against their asserting this right as plaintiffs: and accordingly in Richardson v. Smallwood, Rolls, 17th July, 1822, where the plaintiff had subsequently to the date of the settlement become a creditor by recovering damages for breach of a covenant in a lease previously granted to him by the settlor; the suit was entertained. In that case the Master of the Rolls (Sir T. Plumer) observed that the statute declared the deed void as against those creditors whose actions, &c. were or might be hindered or delayed, and that created a question how far it applied to subsequent

Rights of subsequent creditors against a voluntary settlement.

Presumed that a settlement of stock may be impeached by creditors.

Suppose the settlement to contain property merely which is not liable to the demands of creditors at law, as *stock* in the public funds. It may be asked whether such a settlement can be impeached by any of the settlor's creditors. The opinions of two modern judges seem to be, that the settlement could not be called in question by the creditors, because they could not have taken the stock in execution, at law, in satisfaction of their demands (*a*). Justice, however, is in favour of the creditors; and since, in the administration of assets, stock is subjected to the payment of debts by circuity,

---

creditors: he did not recollect any instance of validity being given to a settlement where the party was largely indebted at the time, and subsequent creditors had applied for relief. All the cases said that the deed would stand, if the party was not indebted, and if it was not fraudulent. Being indebted was only one circumstance from which evidence of the intention might be drawn. But suppose a person indebted, to execute a conveyance, such that if those who were creditors at the time complained, it would be void as against them: then if they were paid off and a new set of creditors stood in their places, would that make any difference? Did it not hinder and delay them, and was it not void as against them? If not, it would be easy to evade the statute: the party might pay off those to whom he was then indebted by borrowing of others. If the conveyance could not be invalidated on the ground of the debts alone, the question would be whether it was made for the purpose of defrauding creditors. No doubt, if the party was not indebted at the time, the onus of proving the fraud was thrown on the other side, for he might fairly intend to give away his property; but still it might be fraudulent, as contemplating future debts. His Honour afterwards in giving judgment remarked, that if it was shown that the deed was one which as against any of the creditors could not stand, then the property became assets, and was applicable to the payment of debts generally: all the creditors would come in at whatever times their debts might have arisen: that was decided. His Honour was strongly inclined to consider the settlement fraudulent, but directed a preliminary inquiry as to the debts due at the time of its execution.

(*a*) See *Lord Thurlow*'s observations in Dundas v. Dutens, 1 Ves. Jun. 198. 2 Cox, 235. Also Lord Eldon's in Rider v. Kidder, 10 Ves. 369; and in Guy v. Pearkes, 18 Ves. 197.

probably, by the like mode or analogy, it may be effected in the present instance. Thus, the statutes creating stock, require a will disposing of it to be attested by two witnesses; and if it be not so attested, they give it to the executor; who, as executor, is held to take the stock, subject to all the demands affecting the testator's personal estate in general, consequently liable to the payment of his debts. May it not then be urged, in analogy to this, that as the husband, by the settlement, has altered the nature of the fund, and by vesting it in trustees converted it into *equitable* property, it shall, therefore, in *their hands*, be liable in the first place to the just demands of the settlor's creditors, and that to effectuate such purpose, the moment the fund becomes equitable, it shall be considered as bound to answer, with his other property, his *bonâ fide* debts? If this reasoning be admissible, then a settlement of stock only may be impeached by the settlor's creditors, as it has been effectually done in the two following cases.

In *Taylor* v. *Jones* (*a*), the settlement, dated in 1734, and made after marriage, upon the wife and children, was of 1733*l.* stock, which were vested in trustees; and in 1741 the settlor gave warrants of attorney to confess judgments against him, and his creditors granted him a letter of licence, subject to an agreement that it should not prevent them from proceeding against his effects, but that it should protect his person. The Master of the Rolls decreed that the settlement was void against simple contract creditors, and he ordered the *trust* stock to be sold, and applied in discharge of those debts.

In *King* v. *Dupine* (which shortly followed the last case, and is a decision by *Lord Hardwicke*, and reported in a note by *Mr. Sanders*, in his edition of

---

(*a*) 2 Atk. 600.

Atkyns (*a*)), *A* was intitled, after the death of *B*, and *C*, the wife of *D*, to the reversion of four exchequer annuities, which were vested in *trustees*, under a decree of Chancery upon the above trusts; so that *A* was but a *cestuique trust* in reversion. The plaintiff obtained a judgment against *A*, and filed a bill against *A*, the trustees, and others, and afterwards a supplemental bill, stating that a *fieri facias* had been issued upon her judgment, and that the sheriff had seized the *reversion of the four exchequer annuities*, and had assigned them to *W*, in trust for the plaintiff: and after further stating circumstances which prevented the plaintiff from registering the assignment, the supplemental bill prayed for a *sale* of the *reversion of the annuities*, and payment of the judgment debt out of the proceeds. The *trustees* submitted whether the sheriff could seize the reversion of those annuities, and assign them, and whether the same ought to be sold. The bills were taken, *pro confesso*, against *A*. And as between the plaintiff and the other defendants, *Lord Hardwicke* ordered the trustees and *W.* to assign all their reversionary estate in the *four long annuities* to the plaintiff, with proper directions as to the removal of all obstacles to the registry complained of in the supplemental bill (*b*).

(*a*) 2 Atk. 603, and Reg. Lib. A. 1744. fo. 91. See also Horn v. Horn. Ambl. 79.

(*b*) These cases have been much questioned. See the references, *ante*, p. 314, note *a.*, and see Grogan v. Cooke, 2 Ball and B. 230. It is to be observed that the observations of Lord Thurlow in Dundas v. Dutens, apply to a case where the attempt was made to impeach the settlement while the settlor was living, and are founded on the circumstance, that during his life the creditors could not by execution at law render the stock available to their demands. But after his death the case admits of different considerations: the stock, if not settled, would then become assets, and if the settlement had for its object to deprive the creditors of the remedies which they would otherwise have on the settlor's death, it seems to come within the meaning of the statute. In these cases it does not seem to have been doubted that the words, goods and chattels, in the statute, com-

Although the debts are contingent, they will defeat the settlement.

It does not seem necessary that debts owing by the husband at the time he makes a voluntary settlement should be absolutely due, in order to enable such creditors to defeat the deed; but that debts *then* in *contingency* would have that effect. Thus in *Rider* v. *Kidder* (*a*), the husband, by settlement prior to his marriage, covenanted for payment to his wife, *if* she survived him, of 3000*l.* within twelve months after his death, &c. He, during the marriage, made a voluntary settlement upon another woman, and died; and *Lord Eldon* is reported to have said, his opinion was, "that the *widow* would be a *creditor* under a marriage settlement that a fraudulent conveyance would affect."

But it is obvious that there must be a mistake in the arrangement of his Lordship's words; and that in order to convey correctly his Lordship's meaning the words ought to be thus transposed: "my opinion is, the plaintiff would be a creditor under a marriage settlement that would affect a fraudulent conveyance," *i. e.* a voluntary conveyance.

A voluntary settlement is good against settlor and volunteers claiming under him.

In cases where the settlement may be avoided by creditors, yet if their debts be afterwards paid, the deed will be good against the settlor, and all persons claiming as *volunteers* by or under him (*b*). In *Curtis* v. *Price* (*c*) *Sir William Grant* said, "a settlement of this kind is void only as against creditors, but to the extent alone in which it may be necessary to deal with the estate for their satisfaction. To every other purpose it is good. Satisfy the creditors and the settlement stands."

It is void if made in contemplation of contracting debts.

Upon the principle of the mere circumstance of the settlor being indebted when he made the settlement after marriage not rendering such deed void, but as

---

prised stock. See Brown v. Bellaris, 5 Mad. 53. Rex v. Capper, 5 Price, 217.

(*a*) 10 Ves. 360—370. (*b*) Hawes v. Leader, Cro. Jac. 270.
(*c*) 12 Ves. 89, 103. S. P. Exparte Bell, 1 Glyn. and J. 282.

primâ facie raising presumptive evidence of fraud, if the settlor be not *then* indebted, but becomes so immediately upon or shortly after the making of it, the intention of making it will be presumed to have been to defraud the subsequent creditors, which will therefore defeat the settlement (*a*).

As to the effect of a power of revocation to defeat such a settlement.

When the *voluntary* settlement upon the wife is of *real* estate, if the husband reserve to himself a general power of revoking the uses and trusts limited and declared in it, that reservation will invalidate the settlement against purchasers for a valuable consideration and statute and judgment creditors (*b*), as it will do in the instances of *ante-nuptial* settlements, which have been noticed in the first section. And it is presumed that voluntary settlements by a husband of his *personal* estate would be equally void against creditors upon presumptive fraud, if they contained the like powers; since, notwithstanding the deeds, the husband would continue to have the absolute dominion over the settled property, and the reservations of such powers would raise a strong inference, that the motives or objects of the settlements, were to exempt the husband's personal estate from his subsequent obligations. It is conceived, however, that the effects of such powers upon the validity of voluntary settlements would be subject to the like distinctions as were mentioned in the last section.

But suppose no power of revocation to be expressly reserved in a voluntary settlement; if, nevertheless, the husband retain or reserve to himself so large an interest or power over the settled personal fund as to show the intent of the transaction to have been to defeat his creditors, under the colour of a *bonâ fide* settlement; such reservation of power will be fatal to the instrument.

Thus in *Russel* v. *Hammond* (*c*), it appears from the

(*a*) 1 Atk. 93. 2 Atk. 481. (*b*) 2 Vern. 510. (*c*) 1 Atk. 16.

last settlement mentioned in that case, that the husband reserved to himself and wife for life an annuity of 27*l.*, which was supposed to be the probable value of the settled estate. This *Lord Hardwicke* considered to be a plain badge of fraud, and almost tantamount to a continuance in possession. He was, therefore, of opinion, that the creditors were intitled to be relieved against such settlement.

Settlor's continuing in possession *after* deed, unless consistently with it, will defeat the settlement.

Another circumstance which has been considered to invalidate a voluntary settlement as against creditors upon presumptive fraud is, when, notwithstanding the settlement purports to be an *absolute* tranfer of personal property, the husband continues in possession of it; and, contrary to the transaction, is permitted to appear as the owner, and to obtain false credit (*a*).

The rule was laid down by all the Judges in *Bamford* v. *Barrow* (*b*), to the following effect: that unless possession accompanies and *follows* the deed, it is fraudulent and void. It is a consequence from this rule or definition, that if the possession of the husband be *consistent* with the settlement, there can be no fraud presumed from the circumstance of the settlor continuing his possession, on account of which the deed can be avoided (*c*).

Accordingly if the settlement of the husband's personal estate were *conditional, i. e.* to take effect upon his being paid a sum of money; and that payment or condition was not merely colourable (*d*); his continuance in the mean time in possession of the settled property would not avoid the settlement; because by the

---

(*a*) Twine's case, 3 Rep. 8 *b*. Stone v. Grabbam, 2 Bulstr. 218. Edwards v. Harben, 2 Term Rep. 587. (*b*) 2 Term Rep. 594, *in notis*. (*c*) Kidd v. Rawlinson, 2 Bos. and Pull. 59. Arundell v. Phipps, 10 Ves. 139—145, *et infra*. Bucknal v. Royston, Pre. Ch. 285. Cadogan v. Kennet, Cowp. 432, and Haselinton v. Gill, 3 Term Rep. 620, *in notis*. (*d*) Griffin v. Stanhope, Cro. Jac. 454.

terms of the deed he is not to part with the possession until the condition be performed, and according to the above rule the possession follows the deed (*a*).

But, although the possession be consistent with the deed, if made so for the purposes of fraud, it will be void.

But it is presumed that if the voluntary settlement appear to be so *contrived* that the possession of the property by the settlor shall be in conformity with the deed, manifesting at the same time the object to be to defraud subsequent creditors, and still to secure the possession of the property to the settlor, such settlement will be void against creditors (*b*).

This, it is conceived, appears from the case of *Stileman* v. *Ashdown* (*c*).—There two purchases were made in the joint names of a father and his two sons. The father paid the consideration money, and afterwards died, having till that time continued in the possession of the lands, and from thence the possession was continued by the two sons. The question was between the executor of the father's judgment creditor and the two sons, who resisted the claim, upon the grounds of the purchases having been made for their advancement. But *Lord Hardwicke* decreed in favour of the judgment creditor, observing that this was a singular case; that in other instances purchases as advancements had been generally made in the names of the children only, and then the possession of the father was considered as that of their guardians during infancy; but that here the purchases having been made in the name of the father as well as in the names of his two sons, they were joint tenants, and that such purchases did not answer the purposes of advancements, for it intitled the *father* to the *possession* of the whole until a division or severance, and by survivorship he might have become intitled to the whole; and that the father had been in possession of the whole estate, and appeared the visible

---

(*a*) 2 Bulstr. 218. (*b*) Lavender v. Blackstone, 2 Lev. 146.
(*c*) 2 Atk. 478; see also Christ's Hospital v. Budgin, 2 Vern. 683.

owner, and the creditor would have been intitled to an *elegit* for a moiety. His Lordship, after noticing that a voluntary settlement by a person not indebted at the time, but made with a view to debts *in futuro*, would be fraudulent and void, said, he *therefore* decreed the creditor, in this case, to be let in upon the estates jointly purchased by the father and sons. His Lordship, therefore, must have considered the purchases, and the father's possession in conformity with the deeds, to be contrivances to defeat creditors.

Settlements made *after* marriage, in pursuance of articles entered into before it, having been already noticed (*a*), it remains to be considered when settlements made *after* marriage upon the wife and children, not in consequence of articles, can be supported against purchasers and creditors on the ground of *valuable* consideration.

Such settlements made in Chancery, or for value, are good against creditors, &c.

It is the practice of almost every day for the Court of Chancery to direct settlements to be made upon the wife, and they are good, not only in equity but at law; for in such cases the presumption of *fraud* fails, and the Court will support its own acts (*b*).

If the settlement be made between the husband and the wife's friends on her behalf without that Court's intervention, in consideration of her father, or some other persón, advancing a sum of money, such settlement, although made *after* the marriage, will be valid against creditors and subsequent purchasers, as a settlement made for a *valuable* consideration, and not within the two statutes of *Elizabeth* (*c*).

As well where the consideration is secured to be paid as where it is actually paid.

And it seems that if the money be not actually paid, but it be well and fairly *secured* to be paid, the effect will be the same.

Accordingly, in a case (*d*) where *A*, as daughter of

(*a*) *Supra*, p. 306. (*b*) Ambl. 121. Cowp. 432—436.
(*c*) Colville v. Parker, Cro. Jac. 158. 2 Ves. Sen. 309. 1 Atk. 190.
(*d*) Wheeler v. Caryl, Ambl. 121. Moor v. Rycault, Pre. Ch. 22, S. P.

B, was intitled to a moiety of 12,000*l.* secured by her mother's marriage settlement; subject to the contingency of being lessened by the birth of another daughter. *A* clandestinely married *C*, and afterwards *B secured A*'s 6000*l. upon his estate*, and *B* made a settlement upon her. The Court determined that the settlement was good against *B*'s creditors.

And the settlement will be good if all the wife's property be settled and the husband settle nothing.

In *Middlecome* v. *Marlow* (*a*) the wife was intitled to a leasehold estate, and a share of her father's residuary personal estate amounting to 500*l.* The wife married during infancy, and her husband afterwards by deed agreed with her father's executors that the 500*l.* should be settled to her separate use for life, and then to the issue of the marriage; and the trustees were empowered to advance to the husband as a loan all or any part of the money. The trustees lent to him all the money, and he became a bankrupt. And at the suit of the trustees *Lord Hardwicke* allowed them to prove the 500*l.* as a debt, although it was resisted by the assignee under the commission upon the ground that the money was not advanced to the husband as a loan, but in payment of the legacy, and receipts were produced under the husband's hand for money due on account of the legacy, one of which was before the deed. And his Lordship observed that although the Court would not have directed that settlement *if* the husband had any estate of his own to settle, yet it was proper as there was no consideration on the husband's side, and as the Court would have done just the same thing upon the Master reporting this to be the circumstance of the case; there was, therefore, no pretence to call the settlement unreasonable. His Lordship added, that the Court never weighed nicely what would be the particular advantage on one side or the other under a settlement, *if it be just in general* (*b*); and he said,

And the Court does not weigh particular advantage on either side, if the settlement be just.

(*a*) 2 Atk. 519.

(*b*) 8 Term Rep. 529.

although, after the execution of the deed, the receipts were given as for a legacy, yet they must be taken to be upon the footing of the deed of trust.

An accession of fortune to the wife is a good consideration to support such a settlement.

It has been before noticed (*a*), that the Court of Chancery will order an additional settlement to be made upon the wife on an increase of fortune falling to her, which settlement will bind both creditors and purchasers of the husband. The effect will be the same if such settlement be made between the husband and the friends of the wife, and be not a colourable, but a *bonâ fide* transaction.

Thus (*b*) *A*, the wife of *B*, having a contingent interest under a bond given by *B* on the marriage, but no judgment entered up nor any trustees added for her, had also a lease of the corn-meter's office left her by the will of her father, whose executor would not consent to the husband's sale of it, unless he made a further provision for her. But on a meeting with her friends she *agreed*, that upon settlement of part of the money arising from the sale for her separate use during *B*'s life, and afterwards for the children of the marriage, she would part with her interest under the bond, and that the other part of the money should go to the husband, who afterwards became a bankrupt. The assignees attempted to set aside this arrangement. But *Lord Hardwicke* supported the transaction, because there was a clear consideration arising from the wife and her friends, which was the parting with her contingent interest under the bond, which he considered she might do, the transaction having been between her and her husband with the *privity and consent of her friends*. His Lordship then said, that this consideration took it out of the statute of *Elizabeth*, in respect of creditors, and that, as to the statutes of *bankruptcy*,

But the husband's settlement, from its magnitude, must not appear to be fraudulent.

(*a*) *Ante*, p. 296, and see 5 Ves. Jun. 737. 10 Ves. 574.
(*b*) Ward v. Shallet, 2 Ves. sen. 16; see also Jones v. Marsh, Forrest 64. Brown v. Jones, 1 Atk. 188.

they did not extend to cases where there was a consideration. If, therefore, the father or collateral relation advanced a sum of money by way of *new* portion, in consideration of which the husband made a new settlement, it would be good against the creditors under the commission, *unless proved* that the settlement *vastly* exceeded the consideration, so that from the inadequacy a collusion or fraud was intended on the creditors.

The consideration may be the relinquishment of any valuable interest by the wife,

As the advancement of money on behalf of the wife for a settlement, will make it good against creditors, so the giving up of any *valuable* interest by her in consideration of the settlement *after* marriage will support it against creditors and subsequent purchasers, because such a settlement does not class among those that are voluntary, but amongst such as are made for a valuable consideration; in fact the wife herself becomes a purchaser for herself and family.

as her jointure,

In the last case the wife gave up a contingent interest under a bond, and in *Cottle* v. *Fripp* (*a*), the wife being intitled to a *jointure* of 40*l.* a year, relinquished it by fine after the marriage in consideration of a bond, and a judgment confessed by the husband to her trustee to settle lands upon her of that yearly amount; the Court decreed that the bond and judgment were intitled to precedency of the husband's other creditors.

or dower.

So also in *Lavender* v. *Blackstone* (*b*), the Court said, that if the wife had joined with her husband in the fine (by which she would have been barred of *dower*), *it* might have made the settlement after marriage to be of good consideration, which otherwise was merely voluntary.

It seems that the provision made by the husband for his wife may in its creation be voluntary and void as against creditors, and yet become afterwards binding upon them.

(*a*) 2 Vern. 220. (*b*) 2 Lev. 147.

Instance of a voluntary *post*-nuptial security being, by the substitution of another, rendered valid against creditors.

Suppose him, then, to give a bond to a trustee to pay a sum of money within six months to be settled upon his, the obligor's, wife and family. This is a good bond against himself, but it may be defeated by his creditors: also suppose the six months to elapse, and that the husband, instead of paying the money, gives *another* bond to the trustee in consideration of being allowed a further period for payment of the money, and of the surrender of the first obligation; it is presumed that, in analogy to the case *ex parte Berry* (*a*), the second bond will not only be binding upon the husband, but also upon his creditors; and upon this principle, that the first bond, although voluntary, (it being good between the parties, and upon which the obligor might have been compelled by legal process to have paid the money), having been surrendered for another security, the forbearance and surrender constitute such a *valuable* consideration, as to make the transaction binding upon the husband's creditors. The transaction, however, must not be fraudulent, for if the original design of the parties in thus giving, accepting, and surrendering the securities, was an attempt to *create* a valuable consideration by trick and contrivance, it would taint the whole transaction and prove ineffectual.

Relinquishment of property of which wife has the absolute disposition, is a valuable consideration.

If the wife enjoy property to her own separate use, and subject to her own separate and absolute disposition, and she give any part of it to her husband, or charge it for his use in consideration of a settlement *after* marriage, she will be a purchaser of the provision, and the settlement will be binding upon his creditors and subsequent purchasers.

Thus, in *Lady Arundel* v. *Phipps* (*b*), the wife had a general power of appointment under her marriage settlement in default of issue male (of which there were none), of certain estates belonging to her own family,

---

(*a*) 19 Ves. 218. (*b*) 10 Ves. 140.

and comprised in the settlement, with the ultimate limitation to her own heirs. She, dealing with such her separate estate, contracted with her husband for the purchase from him of several paintings, drawings, engravings, plate, jewels, &c. by providing out of her estates, after the survivor's death, for payment of several of his debts, amounting to 12,000*l.*, and releasing him from a considerable debt affecting such estates, and which had been borrowed for him, and by resettling the estates as therein mentioned, and which matters were effected by her exercising the above power of appointment. The husband, on his part, assigned to trustees for his wife the paintings, drawings, &c. The question was, whether this *post*-nuptial settlement was valid against the husband's creditors. The husband it seems continued in possession, but which appeared to be unavoidable, and was not inconsistent with the deed, since his possession must be considered as that of the wife, the trust being to permit her to use and enjoy, &c. And *Lord Eldon* expressed his opinion that, if the wife's purchase were *bona fide*, it was of no consequence whether it was before or after marriage; that the mere circumstance of the possession of *chattels*, however familiar it might be to say that it proved fraud, amounted to no more than that it was *prima facie* evidence of property in the man possessing them, until a title not fraudulent were shown under which that possession had followed.

But the price paid must be in proportion and reasonable,

The case was never decided in equity, though much discussed both there and at law (*a*). At law the settlement, under all the circumstances, was found by a jury to be fraudulent, but not to the satisfaction of *Lord Eldon*, who intimated, that if the property sold to the wife bore any *reasonable* proportion to the value of the 12,000*l.*, the settlement would be good if de-

(*a*) 6 East, 257.

vested of circumstances of fraud. He therefore directed an issue to the Court of Common Pleas, the trial of which, I believe, was prevented by the compromise of the suit.

which if the Court cannot determine, must be left to a jury.

What is a *reasonable* proportion or value between the thing given or paid, and that settled in consideration of it by the husband, is a calculation and result dependent upon each case in connexion with collateral circumstances. The question is incapable of a general definite answer, and when the Court is unable to draw the conclusion after weighing all the circumstances, the fact must be ascertained by a jury. This alone can be affirmed, that if the settlement be just in general, the Court does not weigh with exactness the particular advantage gained on the one side or the other; but that if the disproportion be so great as would strike any man of common sense with the inadequacy between the settlement and the price given for it, then such circumstance will raise so violent a presumption of fraud as to vitiate the transaction, and let in the husband's creditors.

Husband's title under description of his wife's "next of kin," &c.

III. The husband has sometimes claimed his wife's personal estate after her death, when by settlement, &c. it was ultimately limited to "her next of kin," or "to her next of kin or personal representatives," or "to her relations." But it has been determined against his claim, upon the principle that such expressions are to be regulated by the statute of distribution (*a*), which, by the word "kindred," mentioned in it, means only persons related to the intestate *by blood*, one of which the husband is not; so that whether the limitation in a settlement be as above, or the wife, under a power contained in it, appoint to her next of kin, &c. (*b*), without further addition or explanation, her husband

---

(*a*) 22 and 23 Car. 2, c. 10. (*b*) 14 Ves. 382.

surviving her will be unable to make a title to the property under such a description (*a*).

This subject was so settled by *Lord Rosslyn*, in *Watt* v. *Watt* (*b*); whose decree in that cause was adopted and followed by *Sir William Grant*, the late Master of the Rolls, in the modern case of *Bailey* v. *Wright* (*c*).

There, by the marriage settlement of *Samuel Bailey* and *M. Orrell*, 700*l.* (the latter's fortune) were settled in trust to place 500*l.*, part of that sum, at interest, and to pay such interest to *M. Orrell* for her separate use during the joint lives of her and her husband; and if she survived him, the trustees were to pay to her the 500*l.*; but if she died before him, then to pay it as she should have appointed; and in the event of no appointment, in trust "for the next of kin or personal representatives of the said *M. Orrell*." The trusts declared of the 200*l.*, remainder of the 700*l.*, were to lend it at interest to the husband upon his bond during his life; which interest he was to retain or be paid, and the capital was to be paid to his wife, if she survived him, but if he were the survivor, then according to his wife's appointment; and if she made none, then in trust "for the next of kin or personal representatives of the said *M. Orrell*." No property of the husband was included in the settlement. The wife died without issue, and without having made any appointment, and her husband claimed the funds against her sister under the above ultimate limitations. But *Sir William Grant* decided against the husband's claim, upon the intention appearing on the settle-

---

(*a*) As to the construction of limitations of this kind, see Smith v. Campbell, 19 Ves. 400. Pope v. Whitecombe, 3 Mer. 689. Brandon v. Brandon, 3 Swan, 312, and *post*, chap. 14. sec. 5.

(*b*) 3 Ves. 244. (*c*) 18 Ves. 49.

ment. His Honour said, "had it been meant that the husband should take by surviving his wife, the *expression* was quite obvious, that, in that event, and in default of appointment, the whole of the two sums should be paid to the said *S. Bailey* for his own use; that both husband and wife are mentioned by their *names* wherever they are spoken of in the settlement; but that *they* had a view to *uncertain* persons who could be designated only by some *general* description; that it seemed hardly conceivable that in a *marriage settlement* a limitation to the wife's 'next of kin' can be introduced except for the purpose of excluding the husband; and that if the intention was to exclude him by the first words 'next of kin,' he could not be let in under the subsequent words 'personal representative;'—that whatever the latter words might mean, standing by themselves, they could not as used in this case take from the first words the sense which they properly had, and were here obviously intended to bear." The husband's bill was dismissed *with costs*.

It occurs, from the attentive consideration of the above judgment, that cases may happen where the husband may be included under a general disposition by his wife to her "next of kin," &c. although in a legal sense he does not strictly answer the description. *Sir William Grant* has said, as before appears, that under these words in a *marriage settlement*, such an interpretation could scarcely be made; the reason is, that from the inference deducible from the circumstance of the husband being a party to it, the intention was that the husband should take no other interest in any event than what is expressly given or reserved to him by the deed. The same inference seems to arise, and to be equally applicable, when by the settlement the ultimate limitation of the property is reserved or given to the wife's "legal personal representatives," or to her "personal representatives," for by these terms the intention must have been that those persons only should have

the property who could claim it in their own rights, viz. the wife's *next of kin*, which restricts the above expressions, as it has been observed, to kindred or relatives of *her own blood* and family (*a*). But this construction or interpretation is not irrefragable; it may be repelled by the intention and effect of the whole instrument. Accordingly, *Lord Eldon*, in *Garrick* v. *Camden* (*b*), a case upon a will, said "that it was competent, and required from the Court, to look through the whole will, and to see whether, *from the whole*, an intention was manifested to include the *wife* among those who were to be taken *more strictly* as next of kin, a description *prima facie* excluding her;" and his Lordship observed, that upon the following words, "to be divided as if I had died intestate," the words "next of kin" being omitted, might, *upon the whole*, admit, or even authorise or require, such a construction as to let in the widow. If so, the same words used in the wife's will made under a power, or similar words in a bequest to her, must also intitle the *husband* to a share. But it is to be observed, that in these cases the widow or husband do not take under the statute of distribution, but as *personæ designatæ* in the will under the intention there manifested: such intention sometimes enlarging the usual acceptation and effect of the words used, so as to let in those persons not strictly answering the description, with those who do so; and at other times restricting the legal import of the expressions, so as to exclude some of the persons who might otherwise have taken under them, as answering the description required by the statute. The

---

(*a*) See Lord Alvanley's reasoning in Bridge v. Abbott, 3 Bro. C. C. 224; also Jennings v. Gallimore, and Long v. Blackall, 3 Ves. 146, 486; and Lord Cranley v. Hale, 14 Ves. 307. Horseman v. Abbey, 1 Jac. and Walk. 381. Wellman v. Bowring, 1 Sim. and Stu. 24. (*b*) 14 Ves. 382.

decisions below referred to (*a*) will more fully illustrate these observations.

When, however, the ultimate limitation of personal property is made to the *executors* or *administrators* of the wife, if the husband be appointed her executor, or he administer to her, he will be intitled to it, as representing her, and as answering the description in the instrument (*b*).

Having now finished the first general division of the treatise, we shall next proceed to the consideration of "The rights acquired by the wife in the real and personal estates of her husband, and her power over the former."

(*a*) Greenwood v. Greenwood, 1 Bro. C. C. 32 *in notis*. Wimbles v. Pitcher, 12 Ves. 433; and Cotton v. Scaranck, 1 Madd. 45. Most of the cases are collected and stated in the "Law of Legacies," 1 vol. p. 120 to p. 130. 2 *Ed.* (*b*) 15 Ves. 537.

CHAPTER IX.

THE RIGHTS ACQUIRED BY THE WIFE IN HER HUSBAND'S REAL ESTATES, AND HER POWER OVER THE SAME.

By the intermarriage the wife becomes intitled to an estate for life, upon surviving her husband, in a third part of all such estates of inheritance of which he was solely seised during the coverture, and to which any issue she might have had might by possibility have been heir.

This interest of the wife is termed her Dower, and is the provision which the common law has made for her support, and the nurture and education of the younger children (*a*). We shall, therefore, proceed to the consideration of this right of the widow, under the title

DOWER.

In treating upon the subject, the same method will be pursued which has been adopted in the first division of the work, by considering it under the following heads or sections:

I. *Who are intitled to dower.*
II. *Of what estates and interests.*
  1. *Of what estates.*
  2. *Of the widow's election between two estates or interests.*

(*a*) Gilb. "Dower," 363. Co. Litt. 30. 2 Black. Comm. 130.

3. *As to her right to endowment of improvements, and when intitled to more than one-third of the estate for dower.*
4. *The necessary seisin of the husband; and*
5. *Of the issue as to dower.*

III. *Assignment of dower.*
1. *When to be made.*
2. *By whom.*
3. *In what manner; and the remedies for excessive assignments.*
4. *Effects of assignments in regard to the husband's incumbrances.*

IV. *Widow's interest, rights, and powers, in respect of her estate in dower.*

V. *Remedies for obtaining dower.*
1. *In a Court of Law; and*
2. *In a Court of Equity.*

I. Who are intitled to dower.

A legal marriage necessary.

In order to intitle a woman to this legal provision, she must answer the description of a lawful wife. Marriage, therefore, must have been legally solemnised between persons competent to enter into the contract; for a husband's second marriage during the life of his first wife, will not intitle the second to dower; and the law is the same if a wife take a second husband while the first is living, because such marriages are *void*; so that the second wife in the first case, and the wife in the second, are not lawful wives (*a*). But if the marriage be not actually void, but *voidable*, and it continue undissolved by sentence during the husband's life, his widow will be intitled to dower; since it is too late to apply for the avoidance of the marriage after his death (*b*). Thus, in *Rennington*'s *case* (*c*), the widow

Distinction on the subject between a marriage void and voidable.

(*a*) Moor, 226. Perk. sect. 304. (*b*) Moor, 225. 228. Wickham v. Enfield, Cro. Car. 352. Co. Litt. 33. (*c*) Noy's Rep. 29.

claimed dower. It was urged against her demand, that she was niece to her deceased husband's first wife; but the objection did not prevail, since there was no divorce during the husband's life.

Evidence of marriage,

When in a writ of dower the legality of the marriage is the point in issue, and it was celebrated in this country, no evidence is admissible upon the subject

by Bishop's certificate.

but the certificate of the Bishop of the diocese where the marriage was solemnised (*a*). This certificate, when granted, is final; it cannot therefore be replied to (*b*). Hence the Bishop need not to certify the day or place of the marriage (*c*). His general certificate of the parties having or not having been legally married is sufficient (*d*); the forms of which and of the pleadings may be seen by referring to the books mentioned in the note (*e*). But if the marriage be celebrated in a foreign country, and consequently out of the jurisdiction of the temporal courts of this kingdom, in such cases, since those Courts cannot compel a return to a writ directed to the Bishop, the legality of the marriage must, therefore, of necessity be tried by a British jury.

When by a jury.

"If," said the Court, in *Ilderton* v. *Ilderton* (*f*), "the trial cannot be by certificate, we lay it down as a proposition fundamental and incontrovertible, that the trial is to be by the country; and for a reason that is unanswerable, that there may not be a failure of justice." —In that case the marriage took place in *Scotland*, and as the subject under consideration was fully and ably discussed, it is worthy of the particular attention of the reader.

Marriages on elopements to Scotland valid.

It is proper to consider, as connected with the present subject of inquiry, the validity of those marriages where

---

(*a*) 2 Burn Eccl. Law, 486. Dyer, 368 *b*. (*b*) See Harg. Law Tracts, 452, and Robins v. Crutchley, 2 Wils. Rep. 122. (*c*) Cro. Car. 352. (*d*) Dyer, 368, *b*. 9 Rep. 19, *b*. (*e*) Co. Entr. 180, 181. Rast. Ent. 228. 1 Bro. Ent. 204. Rob. Ent. 240. (*f*) 2 Hen. Black. Rep. C. P. 159.

the parties elope, go to *Scotland*, marry there, and return immediately afterwards. To form a rational judgment upon this matter, it is necessary to ascertain what the law was previously to the passing of the marriage-act (*a*), and whether that statute made any alteration in this instance.

Before that act, the age required by the common law to render obligatory a marriage between two persons, was that of *fourteen* in the male, and of *twelve* in the female (*b*). If they had attained those ages, the law considered them competent to enter into the marriage agreement without the consent of any persons: these were the ages of legal discretion. The common law even permitted them under those ages to contract for a future marriage, from which however they were allowed to dissent when they arrived at such ages of discretion (*c*). The laws of *England* and *Scotland* concurred in the above particulars, and the law of *Scotland* still continues the same (*d*); so that, whether in *England* or in *Scotland*, if the male had attained to fourteen years, and the female to twelve, their marriage would have been legal and binding without the consent of any one. This liberty having been found inconvenient, the marriage-act was passed, which renders void all marriages in *England* of persons by *licence* under the ages of twenty-*one*, without the consent of the *fathers* of the minors; or, if dead, of the *guardians* lawfully appointed by them; or if there be none, then of the *mothers*, if unmarried: or, if dead or married, then of *guardians* to be appointed by the Court of Chancery. The statute does not require consent to the marriages of minors after due publication of *banns*; the legislature having considered that, from the publicity of the notice, &c., it was in the power of the parents, guardians, or friends

---

(*a*) 26 Geo. 2. c. 33. (*b*) Co. Litt. 79. (*c*) Litt. sect. 104.
(*d*) 1 Ersk. Prin. of the Law of Scotland, 62.

of the infants, to prevent such marriages if they were improper. The act in conclusion declared, that nothing in it should extend to *Scotland*. It is obvious, then, that the act introduced a *new* rule in regard to the marriages of minors celebrated *in this* country; but with respect to those performed in *Scotland*, they being *excepted*, the rule of the common law remained as to them: therefore, as before the statute, the marriage of a male of the age of fourteen years, with a female of the age of twelve, was good; so, as it seems, it will be, since the act, if it be solemnised in *Scotland* according to the law of that country. Hence it appears, that the opinions of writers upon the law of nations, against the validity of marriages between the subjects of one state, in another, to which they went to evade the laws of their own, are not applicable to the present subject (*a*); for here there is no evasion, no breach of any law,—not of the marriage-act, because marriages in *Scotland* are excepted,—nor of the common law of *England*, since, prior to that statute, such marriages here were valid. There is, therefore, no principle, as it would seem, upon which these marriages can be considered illegal. Their validity, however, rests not solely upon the strength of the above observations; for it was decided in *Compton* v. *Bearcroft*, on appeal to the delegates (*b*), that a marriage in *Scotland* between two *English* subjects, the appellant under age and having eloped with the respondent without the consent of her guardian, was a good marriage.

This being the solemn decree of the proper and

(*a*) Huber. ad Pand. lib. 1. t. 3, De conflictu legum, sect. 8.
(*b*) 1 Dec. 1768, and briefly stated in Bull. N. P. 113, and in 2 Hagg. 443, 444. See also Dodson's Reports of Sir William Scott's Judgment in Dalrymple v. Dalrymple. S. C. 2 Hagg. 54. The same point is said to have been decided in Brook v. Oliver, Rolls, 1759, and Bedford v. Varney, Chancery, 1762, cited 2 Hagg. 376, *n.* and the question is now set at rest.

highest jurisdiction over the present subject, has, as it is conceived, settled the law in favour of those marriages. To which may be added, the opinion of *Lord Eldon* in *ex parte Hall* (*a*). In that case, the parties eloped and were married in *Scotland*, the wife being then under age. Previously to a re-marriage in *England*, it was agreed between the fathers of the husband and wife, that they should make mutual settlements upon their two children, which were effected by *A* the husband's father executing a bond before the second marriage, securing an annuity to the wife, and by *B* the wife's father agreeing to pay an annuity to the husband, and which was regularly discharged. *A* was solvent when he executed his bond, and paid the annuity till shortly before he became a bankrupt. *Lord Eldon* supported the bond of *A* against his creditors, under the above circumstances, but delivered an opinion which could only have been pronounced upon the supposition of the marriage in *Scotland* being valid; "for," said his Lordship, "the settlement *after* the marriage in Scotland *not* being *ante*-nuptial, the re-celebration of the marriage in *England* could not have supported the bond as given for a *valuable* consideration;" or, in other words, since the marriage in *Scotland* is a legal and binding marriage, the bond could not be supported against the creditors if it had depended upon the fact of having been given in contemplation of a marriage between the husband and wife, because that ceremony had been previously effectually performed in *Scotland*, so that the obligation was voluntary, as having been made after marriage (*b*).

Marriages of British subjects in foreign countries valid, if made according to the laws of those countries.

With respect to the marriages of *English* subjects, celebrated in *foreign* countries, it may be considered that, if they be duly solemnised according to the laws

(*a*) 1 Ves. and Bea. 112—114.

(*b*) Upon the subject of these settlements, see chap. 8. sect. 2.

of those countries where the parties happen to be, they will be good (*a*), and intitle the widows to dower (*b*).

The validity of one of those marriages was recently litigated in the Consistory Court (*c*). The suit was instituted by the Honourable *Octavia Spinelli*, Princess-dowager of *Butari* in *Sicily*, commonly called *Lady Herbert*, against *Robert Henry Lord Herbert*, son of the *Earl of Pembroke*, for a restitution of conjugal rights. The parties were married clandestinely at *Palermo* in *August* 1814. The marriage was proved by the priest who solemnised it, and that it was performed according to the rites of the Roman Catholic Church of *Sicily*. The parties were not minors when the ceremony took place. *Sir William Scott* observed, that it was established by law, that if a marriage was valid in the country where it took place, according to the rites and usages of that country, it was a good one *here*; that it was so held upon a sort of *jus gentium*; for, however naked the forms might be, however meagre in substance, provided they conformed to that standard, the canonical law recognised them as perfectly valid; that the evidence in this case had established the certainty of these forms having been complied with, and the opinions of several judges in *Palermo* annexed to the papers before the Court clearly determined the validity of the marriage, although a *clandestine* one. He therefore decided according to the prayer of *Lady Herbert*, and decreed *Lord Herbert* to receive her as his wife with conjugal affection, and to certify to it by the first day of Michaelmas term that he had complied with the Court's injunction (*d*).

(*a*) Dalrymple v. Dalrymple, *ub. supra*. Scrimshire v. Scrimshire, 2 Hagg. 395. Middleton v. Janverin, 2 Hagg. 437; and see Ambl. 303. 1 Atk. 50. (*b*) Ilderton v. Ilderton, 2 Hen. Black. 145. (*c*) Herbert v. Herbert, 30th April, 1819. 2 Hagg. 263. 3 Phill. 59. (*d*) With respect to the validity of foreign marriages, and some other points connected with the law of marriage, see the Addenda, at the end of vol. 2.

Marriages of idiots and lunatics.

By the common law, which differed from the civil, the marriage of an idiot or lunatic was considered valid, and consequently the wife intitled to dower. But it is now settled that an idiot cannot marry, as being incapable of entering into any contract *pro defectu animi* (*a*).

[And for the same reason lunatics are incapable of marrying, except during lucid intervals; and their marriages, as well as those of idiots, are absolutely void (*b*).]

And it is provided by the statute of the 15th Geo. II. c. 30, that the marriages of lunatics and persons under phrenzies (if found lunatics under a commission, or committed to the care of trustees by any act of Parliament), before they are declared of sound mind by the Lord Chancellor or the majority of such trustees, shall be void.

[By the statute of the 51st Geo. III. c. 37, the provisions of this act are extended to Ireland.

And these statutes render the marriages in question void, although they may have been contracted during lucid intervals (*c*).]

Of natural children.

Before leaving the present subject, it will be proper to observe that *natural* children have been held to be within the marriage-act (*d*). If the decision had been the reverse, then even in *England* the marriage of a natural child, an infant, would have been good, if, being a male, he were then of the age of fourteen years, and if a female, of the age of twelve (*e*); and in that case the titles to dower, curtesy, &c. would have attached, as in the usual instances of marriage between adults. There is, however, a difficulty attending the marriage of a natural child, an infant, which does not

---

(*a*) Morrison's case *coram Delegat.* 1745, cited 1 Hagg 417. See 2 Phill. 19. (*b*) Turner v. Mayers, 1 Hagg. 414. Browning v. Reane, 1 Phil. 69. (*c*) 1 Hagg. 417. (*d*) 26 Geo. II. c. 33. (*e*) 11 East, 21.

occur in the instance of a legitimate child, a minor. This arises from his character as such in the view of the law; for he being considered by it as *nullius filius*, is presumed to have no father or mother to *consent* to his marriage; consequently his marriage by *licence* with the consent of either would not be a compliance with the marriage-act, and therefore void (*a*). He will labour under the same disability if his putative father were dead, having by will appointed a *guardian* for him; for such person would not be his guardian *duly* appointed as required by that statute, since a putative father is not authorised by the act of *Charles* the second (*b*) to appoint a guardian for his natural child (*c*). The methods, therefore, by which the marriage of a natural child can be legally solemnised, are either after the publication of banns, or after the appointment of a guardian for him by the Court of Chancery, which would be a compliance with the marriage-act; and then the marriage might be performed under a licence with the consent of such guardian.

Feme-alien not in general intitled to dower.

If the wife be an alien, she will be excluded from dower, except she be *Queen-consort* or be married by licence of the king; for by policy of law no alien is capable of holding lands (*d*):—Thus, if a man marry an alien and then dispose of his lands, and his wife is made a *denizen* and her husband dies, she will not be intitled to dower out of the estate sold; because denization has no retrospect, and her capacity to be endowed originated in the circumstance of denization alone. The law would have been otherwise if the wife had been *naturalised*, for naturalisation unqualified has reference to the day of the party's birth, and places him or her in most respects in the same state as if actually born

---

(*a*) Priestley v. Hughes, 11 East, 1. Horner v. Liddiard, 1 Hagg. 337. (*b*) 12 Car. II. c. 24, s. 8. (*c*) Ward v. St. Paul, 2 Bro. C. C. 583. Horner v. Liddiard, Dr. Croke's Rep. 180. 1 Hagg. 349. (*d*) 2 Black. Comm. 131.

within the king's allegiance (*a*). But by a special Act of Parliament, not printed, it is provided, that thenceforth all women-aliens, who should be married by licence of the king, should be intitled to dower in the same manner as English women (*b*).

The necessary age of the wife.

The widow must be of the age of nine years at her husband's death, or she will not be intitled to dower. The reason assigned is, *quia junior non potest dotem promereri, neque virum sustinere* (*c*), and therefore cannot have an heir who may inherit the estate: but this doctrine of nonage is applicable to the wife only; for although the husband be under the age of nine years at his death, his wife having then attained that age, shall be endowed (*d*). It is not necessary that the woman should be nine years old at the time of marriage; for if she were then of the age of seven years only, and survived nine at the husband's death, she would be intitled to dower, the law supposing her capable from that period of having heritable issue.

Accordingly, if *A* marry *B*, of the age of seven years, and alien his lands of inheritance, and *B* arrives at her ninth year, and then her husband dies, she will be intitled to dower of the lands aliened (*e*).

As the wife will be intitled to dower at so early an age as nine years, so she will be intitled to dower however far advanced in years she may be at the time of her marriage, because the law cannot fix upon the precise period when her capability of having issue determines. *Sir Edward Coke* mentions an instance of a woman having a child after she attained her *sixtieth* year (*f*).

II. Of what estates and interests.

(*a*) Co. Litt. 33, and see chap. 1, sect. 1. (*b*) Co. Litt. 31 *b*, note 9. (*c*) Litt. sect. 36. Co. Litt. 33. 1 Roll. Abr. 675. (*d*) Co. Litt. 33. (*e*) Co. Litt. 33. (*f*) Co. Litt. 40 *a* and *b*. 1 Roll. Abr. 675, pl. 10.

1. It has been observed that the widow is intitled by the common law to be endowed of a *third* part of all the freehold *lands* and *tenements* of which her husband was solely seised in fee simple or fee tail at any time during the coverture, and to which any issue she might have had might by possibility have been heir (*a*).

To what estates dower attaches.

Accordingly, dower may be claimed out of all corporeal hereditaments, and out of all incorporeal hereditaments that savour of the realty, *i. e.* which issue out of corporeal ones, or which concern or are annexed to, or may be exercised within the same, as rents, estovers, common appendant, or in gross (if certain), advowsons whether appendant or in gross (*b*), fairs, bailiwicks, profits of a park-keeper, profits of courts, tithes, woods, mills, piscaries, tolls arising from public navigable rivers (*c*), and the like (*d*). But if a common be *sans nombre*, *i. e.* without stint, the wife shall not be endowed; for as the heir would have one portion of the common, and the widow another, and both without stint, the common would be doubly stocked, which would be inconvenient (*e*).

In *Stoughton* v. *Leigh* (*f*), a question arose upon the widow's title to dower of mines. They were numerous, consisting of lead, coal, and minerals; some of them

---

(*a*) 2 Black. Comm. 131. Litt. sect. 36—53. Perk. sect. 301. Fitz. N. B. 147. (*b*) Cro. Jac. 621. F. N. B. 148. c. Co. Litt. 32 *a*. Ibid. 32 *b*, note 2. (*c*) Buckeridge v. Ingram, 2 Ves. jun. 652, 663. This case related to a share in a navigation constructed under a private Act of Parliament. The shares, in undertakings of this description, are usually declared to be personal property, by the Acts under which they are carried on. But, in the absence of an express enactment to that effect, they possess the qualities of real estate. Thus, shares in the New River Company are real estate. Drybutter v. Bartholomew, 2 P. W. 127. (*d*) 2 Black. Comm. 131. Perk. sect. 342—347. Co. Litt. 32. (*e*) 2 Black. Comm. 132. Co. Litt. 32 *a*. Perk. sect. 341. Godb. 21. (*f*) 1 Taunt. 402.

being in the husband's own lands, and others of them in the estates of other persons; but of which latter mines he had the grants in fee. Some of the mines had been let by him to tenants; and of all those mines in the hands of himself and his lessees, some had been worked during his life, and others not; and of those which had been wrought in his lifetime, some were discontinued to be so from his death. The Court was of opinion that the widow was dowable of all the mines and *strata* of lead or lead ore, in the lands of other persons, which had been opened and wrought *before* her husband's death, and in which he had an estate of inheritance during the marriage; and that her right to endowment had no dependance upon the subsequent continuance or discontinuance of working them, either by the husband during life, or by those claiming under him since his death. The Court was also of opinion, that such right of the widow was in no degree affected by leases made by her husband *during* the marriage; but that if any of the existing leases for years were made by him *before* the coverture, then the endowment, if made of the mines, ought to be of the reversions, and of the rents reserved by such leases as incident to such reversions; in which case the widow would be bound, so long as the demises continued, to take her shares of the renders, whether pecuniary or otherwise, according to the terms of the respective reservations; but that she was not dowable of any of the mines or *strata* which had not been opened at all, whether in lease or not.

Widow dowable of mines and minerals, which were worked in husband's lifetime.

Not dowable of mines, &c. unopened.

It was adjudged at the period when castles were built and holden for the protection and defence of the kingdom, that they should not be subject to dower; the law in this instance preferring the public good to private individual claims. Also if a messuage or dwelling house were *caput comitatûs sive baroniæ*, the widow was not intitled to dower; but this doctrine extends only to

No title to dower of castles which were holden by tenure of defending the realm

baronies by tenure, and not to mere titular baronies created at this day (*a*).

Annuities.

Of a mere annuity granted to the husband and his heirs, the widow will not be intitled to dower, because it is a personal demand only, a mere charge upon the person of the grantor, and does not issue out of any lands or tenements (*b*); as in the instance of the husband being possessed of a rent granted to him out of a *subsisting* rent or duty, which was the case of the *Earl of Stafford* v. *Buckley* (*c*); or in the instance of the husband being possessed of a yearly sum payable out of the Post-Office revenues, which was the case of *Lady Holdernesse* v. the *Marquis of Carmarthen*, before *Lord Thurlow* (*d*).

Annuity out of the Post-Office revenues.

It may happen from the nature of the property and the different kind of remedies given for the recovery of it, that it will be considered either a real or a personal inheritance, at the election of the heir, so as to place the widow's right to endowment in his power.

Instance where the right to dower depends upon the will and *election* of the heir.

Thus of a rent-charge, the widow is *prima facie* intitled to be endowed; but if *before* distress and avowry made her husband die, and the heir brings a writ of annuity, (a mere *personal* remedy,) and recovers judgment in it, or proceed no further than filing a declaration, the heir's election is bound, and the rent-charge will be converted into a mere personal annuity, in which the widow cannot claim dower, for the lands are for ever discharged from the real remedy by distress. But nothing short of the heir's election in a Court of Record, by suing out this writ and recovery, or declaring in the action, or distraining and avowing for the rent, can fix the nature of the property, and

---

(*a*) Co. Litt. 31 *b*. Gerard v. Gerard, 1 Lord Raym. 72. 3 Lev. 401. 1 Salk. 54. 253. 5 Mod. 64. 12 Mod. 84. Skinn. 59. Comb. 352. Holt. 260. (*b*) Co. Litt. 32. (*c*) 2 Ves. sen. 170. Aubin v Daly, 4 Barn and Ald. 69. (*d*) 1 Bro. C. C. 377.

determine the widow's right to dower: so that if before such declaration or avowry by the heir, the widow recover judgment against him in a writ of dower, her right to dower will be unalterably established (*a*).

[The right to dower may also depend on the election of a third person. If, previously to the title of dower attaching, the husband has by contract given to the tenant or another an option of purchasing the estate, the exercise of that option, either before or after the husband's death, will convert the estate into personalty, and defeat the widow's right to endowment (*b*).]

Whether the widow of a partner is intitled to dower out of lands bought by the partnership.

[When real estates are purchased for the use of a commercial partnership, and paid for out of the funds of the partnership, and conveyed to one of the partners, he will have both the legal and equitable interest in his share, and his widow will therefore be intitled to dower out of that share, unless the nature of the agreement between the partners under which the purchase is made be such as to give to the property the character of personalty. If the estate purchased be conveyed to the partners as tenants in common, the right of their widows to be endowed out of their respective shares will depend upon the same question. With reference to this question it has been decided, that if there be an agreement between the partners that on the dissolution of the partnership the land shall be sold, that agreement will convert it into personalty (*c*). It seems to be doubtful whether, in the absence of such agreement, the circumstance that the land was bought for the purposes of the partnership will alone convert it, as between the representatives of a partner. In several cases it has been held, that the share of a partner in real estates thus purchased passed to his real repre-

---

(*a*) Co. Litt. 144 *b*. Fitz. N. B. 152 *a*. Co. Litt. 145.

(*b*) See 7 Ves. 436. Townley v. Bedwell, 14 Ves. 591.

(*c*) Thornton v. Dixon, 3 Bro. C. C. 19. Ripley v. Waterworth, 7 Ves. 425.

sentatives (*a*) : and in conformity with these decisions the Lord Chancellor observed, that in cases where persons engaged in partnership have bought freehold houses, the difficulty of disentangling and arranging property of different natures, partly personal and partly real, had never, except by the effect of the contract or the will, been held sufficient against the heir (*b*). However, the Lord Chancellor is reported to have held, that real estate, involved in a partnership concern, was to be considered as personal (*c*) ; and in another case, he is said to have decided against the heir on that ground (*d*) ; but it appears uncertain whether it was

---

(*a*) Thornton v. Dixon, *ub. sup.* Bell v. Phyn, 7 Ves. 453. Balmain v. Shore, 9 Ves. 500. (*b*) 11 Ves. 666. (*c*) Selkrig v. Davies, 2 Dow. 242. (*d*) Townshend v. Devaynes, 30th June, 1812. Montagu on Partnership, vol. i. notes, p. 97. In this case, freehold paper-mills and premises had been purchased for the use of the partnership in which the testator was engaged. It was stated by Devaynes, his partner, that, by a memorandum of agreement between them, on the death of either, the survivor was to have the option of purchasing the share of the deceased, as it then stood, and he proposed to buy the testator's share: the executors accordingly agreed to sell it to him for 4700*l.* The suit was instituted by the executors against Devaynes and the heir at law for a specific performance of this agreement, and praying that the heir might join in the conveyance. The first decree pronounced at the Rolls directed a specific performance without prejudice to the claim of the heir. A subsequent order was made, by which (in conformity with the principle of the previous cases) it was referred to the Master to inquire the circumstances under which the premises were purchased and held, and how much, if any, of the 4700*l.* arose from such part or parts of the premises as was or were personal estate, and whether the testator entered into any agreement for the sale of the premises, which was binding on his heir at law. The Master reported that 1300*l.*, part of the 4700*l.*, arose from personal estate, and that no binding agreement for a sale had been entered into by the testator. He stated that the memorandum alluded to by Devaynes had not been found. It appears probable, however, that some such document was afterwards discovered; for, by the decree, the Lord Chancellor, upon hearing the exceptions, and upon reading the affidavit of H. Cooke and the draft of the articles therein referred

intended in these cases to decide the general question, his Lordship having, on a subsequent occasion, spoken of it in terms implying that he considered it to be still doubtful (*a*).

The cases referred to above agree, that real estate purchased by a partnership is to be treated as part of the joint effects as between the partners: and it may therefore be inferred that it will, with the other joint property, be primarily liable to the payment of the joint debts as between the representatives, and that if the heir or widow of a partner be intitled, their right can attach only on the surplus.

Where real estate was purchased for the purposes of a partnership, and paid for out of the joint effects, but, by the agreement between the partners, it was to become the separate property of one of them, to whom it was conveyed, and he was to be a debtor to the partnership for the purchase money, his wife was held intitled to dower of the whole (*b*).]

Election of dower in one of two estates.

2. Having spoken of the widow's title to dower as depending upon the election of the heir, we shall next consider in what instances the law obliges the widow to elect dower out of one of two estates, to both of which her title to dower attaches.

As in exchanges.

In the instance of an *exchange*, the widow will not be dowable both of the lands given and taken in exchange; but she must elect dower out of one of the two estates (*c*). So also if a husband seised of a rent-charge in fee purchase the inheritance of the lands out of which the rent issues, the widow must elect of which she will be endowed (*d*). And if the husband make a

Also between land and rent.

---

to, which were admitted to be read by consent of all parties, declared that the whole of the sum of 4700*l.* was part of the personal estate of the testator. Reg. Lib. B. 1811, fo. 1248.

(*a*) 1 Swan. 508—521. (*b*) Smith v. Smith, 5 Ves. 189.

(*c*) Co. Litt. 31 *b.* Perk. sect. 319. F. N. B. 149, N.

(*d*) Perk. sect. 320.

feoffment in fee, reserving a rent, she must elect to be endowed either of the lands or of the rent; and if she make choice of the former, she shall hold them discharged of the latter (*a*). But if there be lord and tenant by fealty, and the lord marries, and then the tenancy *escheats* to him, and he enters and dies, his widow cannot elect between the seigniory and the tenancy; because the seigniory, by the accession to the lord of the tenancy, necessarily became extinct; and his widow receives no injury, since she will be intitled to dower of the lands escheated (*b*). If, however, all or any part of the lands had been assigned to her in dower, and they were afterwards recovered from her by an elder title, then the seigniory would be revived for her, either wholly or in part, according to the extent of her title to dower in the lands so recovered (*c*); for if this were not so, the widow would be deprived of dower *in toto*.

Instances of no power of election.

[And if the tenancy, instead of escheating to the lord, is purchased by him, his widow shall elect whether she will be endowed of the seigniory or of the tenancy (*d*).]

Wife's time to elect is at her husband's death, and not sooner.

The period for the wife to make election is at her husband's death, and not sooner; and in consequence it has been determined, that if she and her husband exchange her lands for others, and then they convey away by deed and fine the lands taken in exchange, she will nevertheless be at liberty to enter upon her own estate after her husband's death (*e*). Upon the same principle, if the widow's right to dower attach upon *two* estates, but in one of which alone she is intitled to be actually endowed, as in the instance of an exchange, before mentioned, and she and her husband convey

If wife having election, by fine during marriage, bar her right to dower in one estate, she may resort to the other after her husband's death.

(*a*) Perk. sect. 324. (*b*) Perk. sect. 321. See chap. 1, upon Curtesy, p. 15, where this subject is more fully explained. (*c*) Perk. sect. 320—321. (*d*) Perk. 320. (*e*) Anon. 1 Leon. 285.

away by fine the estate taken by him in exchange; and die, his widow may claim dower out of his estate given in exchange; because she having a right to elect her dower out of either of them upon the death of her husband, and since the fine estops her from claiming it in the one, she may resort to the other (*a*).

Improvements.

3. When additions or improvements have been made upon the lands previously to the assignment of dower, distinctions have been established in regard to the widow's right of being endowed of them. The distinctions are these:

When dower attaches to them and the increased value of the estate.

If the heir after the husband's death improve the estate, as by building or draining, &c., or if the property be more valuable by other means at the time of the assignment of dower than at the husband's decease, his widow will be intitled to have her dower of the lands so improved and become more valuable, without any allowance to the heir on either of these accounts; because by the death of her husband her title to dower was consummate, and she was intitled to an assignment of it immediately afterwards. Since, therefore, she is intitled to such advantage, equal justice requires that she should bear a proportion of the loss in an unavoidable diminution in the value of the lands intermediate the death of her husband and the assignment of her dower. In such an event she can claim nothing from the heir in respect of such decrease, except it was occasioned by his own voluntary misconduct, as by committing waste; and in that case she would be intitled to a compensation in damages (*b*).

And when wife must bear a proportion of a decrease in value.

When widow is not intitled to dower of improvements, &c.

But the case is different when the improvements or the increase in value of the estate take place during the life of the husband, before his widow's title to dower was complete, since a like adjudication as the last would prove injurious to a third person.

(*a*) See Dyer, 358 *b*, and *infra*, in this sect. pl. 15. (*b*) Co. Litt. 32. 2 Inst. 81. See Park on Dower, 256.

Suppose, then, that the husband makes a feoffment in fee of lands, with warranty, in which his wife had acquired an initiate title to dower; if the feoffee or his heirs improve these lands, or they otherwise become of greater value than they were at the period of the conveyance, the feoffor's widow will only be intitled to them as they were at the time of the feoffment; for if the contrary were the legal rule, she would recover more against the feoffee (the value of a third of the improvements), than he could do against the heir upon the warranty, who is only responsible to the feoffee for the value of the lands at the time of the conveyance, which would therefore be unreasonable (*a*).

But if the feoffment had been *conditional*, and the feoffee had made the improvements, and his estate was defeated by the entry of the husband for a breach of the condition, in which event the husband became seised of his former estate, his widow would be intitled to dower of the improvements as well as of the lands; and the feoffee has no reasonable ground of complaint, since it was his own folly and imprudence to make improvements upon lands which he held by so uncertain a tenure.

[And the same rule holds with respect to improvements by one who has disseised the husband (*b*).

If the husband during the coverture alienes the land, and the alienee impairs the value, as by taking down buildings, it seems that the wife is only intitled to be endowed according to the value at the time of her husband's death (*c*).]

It is a maxim that the widow shall be endowed *de optimâ possessione viri.*

(*a*) Co. Litt. 32, *a. note* 8. Perk. 328. (*b*) Perk. 328.

(*c*) Perk. 329. If the alienee impairs the value after the husband's death, it may be presumed that the widow would be intitled to have her dower assigned according to the value at that time. For she would otherwise have no compensation for the diminution, as she does not in this case recover damages in dower. *Post*, sect. 5.

If, therefore, lands which had been sown with corn and grain by the husband be assigned to her for dower by the heir, she will be intitled to the crops (*a*). Widow intitled to corn, &c. sown by husband on lands assigned in dower.

It has been observed, that a *third* part of the lands is the proportion which the common law gives to the widow for her dower; but there are exceptions to the generality of the rule, founded upon particular customs.

One exception is of lands of the tenure of *gavelkind* (*b*). By the particular custom which established that tenure, the widow is intitled to a *moiety* of the estate so long as she continues chaste and unmarried. This custom she cannot waive, and resort to her third part at common law; it being a maxim, that *consuetudo tollit communem legem* (*c*). Gavelkind lands. Wife intitled to a moiety instead of a third. And cannot waive it.

The reasonableness of the maxim appears in this case; for if the widow could waive the custom and claim her dower, she might retain the latter after a second marriage, which would be contrary to the special custom. If, therefore, she demand a third part at common law against the tenant of the lands, he may aver the tenure to be gavelkind, and plead in bar the customary title to endowment, &c. (*d*).

Another exception to the common law rule occurs in the instance of the custom of *Borough-English*. According to which the widow is intitled to take the *whole* of her husband's lands holden by that tenure for her dower (*e*). Borough-English.

With respect to *copyhold* estates, the widow's title Copyholds.

(*a*) Dyer, 316, pl. 2. Perk. sect. 521. 2 Inst. 81. "Item cum assignanda fuerit ei tertia pars, facta assignatione de mesuagio, assignetur ei, tertia pars de omni quod vir suus tenuit in dominico, secundum statum presentem in terrâ arabili, secundum quod fuerit culta, vel inculta, seminata, vel non seminata; et si fuerit seminata, nihil dabit pro cultura." Bracton 98 *a*. (*b*) For this tenure see 2 Black. Com. p. 84. (*c*) Rob. on Gavelkind, 159—179. Cro. Eliz. 121—825. 1 Leon. 62. 133. (*d*) Hunt v. Gilburne, Cro. Eliz. 121. Davies v. Selby, ibid. 825. Rob. Gav. 179, et seq. Co. Litt. 33 *b*. Rob. Entr. 245. (*e*) For a description of this tenure see 2 Black. Com. 82.

to dower or free-bench depending upon custom (as is afterwards mentioned), such title is capricious, and entirely governed by it.

Suppose, then, the custom to be that if a copyhold tenant marry a *widow*, or that if the husband sell the lands, and his wife receive a part of the purchase money, she shall not have free-bench; these are said to be good customs (*a*).

Having considered of what estates the widow is intitled to be endowed, the subject proposed fourthly to be considered was—

Seisin to found a title to dower.

4. What seisin by the husband is requisite to create a title to dower.

When the husband is *actually* seised of the legal freehold and inheritance of lands or tenements at any time during the marriage, there can be no question as to his widow's right to dower. But it is settled that a *seisin in law* of the husband is sufficient to found his wife's title to endowment. The reason of the distinction between this case and that of curtesy, treated upon in the beginning of this work (*b*), is, that the wife is presumed to have no power of obliging her husband to take possession or actual seisin of the estate; the law, therefore, in her favour considers the *right* to the *immediate* possession of the freehold and inheritance cast by it upon her husband as equivalent to his entry and actual seisin or possession of the estate. I shall first explain and produce some instances of seisins in law, and then proceed to consider generally the sufficiency of the husband's seisin to create a title to dower.

First, as to seisins in law.

Widow dowable upon a seisin in law.

A seisin in law in its usual acceptation is where the inheritance in lands and hereditaments of which a man

---

(*a*) 1 Roll. Abr. 562, pl. 45, 50. The widow of a surrenderee who dies before admittance is intitled to free-bench. Vaughan v. Atkins, 5 Burr. 2764. (*b*) Page 6, et seq.

dies seised or possessed descends upon his heir, who dies before entry or possession (*a*). In such case if the heir leave a widow she will be intitled to dower (*b*).

Distinction as to title to dower when an *abatement* takes place *before* and when *after* the marriage.

This seisin devolves upon the heir instantaneously at the death of his ancestor. It has, therefore, precedence of every act which may be done subsequently to the ancestor's decease. In fact, this seisin of the heir is a continuation of his ancestor's inheritance.

Thus, if immediately after the ancestor's death a stranger enter upon the land and *abate*, still the widow of the heir may claim her dower, if the marriage took place *before* the abatement; because her husband had a seisin in law of the inheritance during the marriage, viz. in the interval between the ancestor's death and the abatement (*c*). But if the heir had been unmarried at the time of the abatement, and he afterwards married, and died without having entered upon the premises, his widow would not be intitled to dower, because he was not any period during the marriage seised even in law of the inheritance, that seisin which he acquired by descent upon his ancestor's death having been devested before the coverture, and never revested during its continuance (*d*).

[And if lands be leased to *A* for life, with remainder to the husband in fee, and on the death of *A* a stranger intrudes, and the husband dies without having entered, the wife will be endowed, in respect of the husband's seisin in law in the interval between the death of *A* and the intrusion (*e*).]

(*a*) Litt. sect. 448. (*b*) Litt. sect. 681. (*c*) 1 Bro. Abr. "dower," p. 255, pl. 75. Co. Litt. 31 *a*. Perk. 371. See 3 Black. Com. 168, for an explanation of abatement. According to a recent decision, an abatement cannot take place, if the land be in the possession of a tenant for years. Bushby v. Dixon, 3 Barn. and Cress. 298. (*d*) Perk. sect. 367. (*e*) Perk. 372. As to the wife's right to dower when the husband being seised of a reversion in fee expectant upon an estate of freehold, the tenant of the particular estate holds over after its determination, and the husband dies without entry, see Park on Dower, p. 32.

Dower of seisins in law of rents.

If a rent descend to the husband-heir, and he die before the arrival of the time for its payment, his widow will be intitled to dower, in consequence of his seisin of it in law (*a*).

And it is said, that if a *rent* be purchased by or granted to the husband and his heirs, and he die before it becomes due, or if he survive that period and die before receiving it, his widow nevertheless shall be intitled to dower (*b*). The principle must be this—that by the conveyance to and acceptance of the grant by the husband, he acquired a seisin in law of the rent, to which a right of dower attached.

Secondly, of the husband's seisin generally in regard to the right of dower.

Must be *legal*.

1. The seisin of the husband must be a *legal* seisin. This requisite excludes the widow from dower of a *trust* estate; for the husband's interest or seisin is, in that instance, purely *equitable*. A modern trust is the same as an *use* at common law (*c*), of which it appears

A *trust* therefore is excluded.

(*a*) 1 Bro. Abr. "dower," fo. 255, pl. 71. 2 Bro. Abr. fo. 249 *b*, pl. 5. (*b*) Perk. sect. 373. 1 Bro. Abr. "dower," fo. 255. pl. 71.

(*c*) In some respects, however, trusts differ from uses at the common law, the doctrines of equity having in general attached to equitable estates, the incidents belonging to legal estates. This principle has been followed with respect to curtesy: that it has been departed from with respect to dower has always been considered an anomaly. The reasons of expediency which gave rise to the distinction are explained by *Lord Redesdale* in Darcy v. Blake, 2 Sch. and Lef. 387. After the statute of uses an opinion at first prevailed, that trusts were merely equivalent to uses before the statute, and that consequently they were not subject to the incidents of dower and curtesy. Under this idea many sales had been effected by husbands intitled to equitable estates, without the concurrence of their wives. Hence, when by degrees, Courts of Equity established the rule of acting upon trusts by analogy to the law, it was found that the security of titles required an exception to be made in the case of dower. But this necessity did not exist in the case of curtesy: for during the coverture the wife's estate could not be aliened without the concurrence of the husband.

Origin of the rule that dower does not attach on equitable estates.

from the recital in the statute of uses, that a widow was not dowable (*a*).

In the case of Banks v. Sutton, 2 P. W. 700, *Sir Joseph Jekyll* suggested a distinction between a trust created by the husband himself, or a purchase by him in the name of a trustee, and a trust created by his ancestor or by another person, and thought that the wife might be intitled to dower in the latter case, though not in the former: and the reason assigned was, that in the former case the legal estate might have been lodged in the trustees for the purpose of preventing dower: but this distinction has been long overruled. 2 Atk. 526. 2 Scho. and Lef. 391.

This rule applies without reference to the circumstances under which the legal estate is outstanding.

In the same case, *Sir Joseph Jekyll* was of opinion that if the legal estate was vested in a trustee upon trust to convey to the husband at a particular period, which arrived before or during the coverture, it ought to be considered in equity as if the conveyance had been actually made, and that the wife would therefore be intitled to dower; and this opinion is supported by the case of Otway v. Hudson, 2 Vern. 583. 2 Ch. Ca. 174, and is sanctioned by an observation of *Lord Talbot* in Attorney General v. Lockley. Sugd. Vend. and Purch. Append. p. 33. But this distinction has not since been attended to (see Forder v. Wade, 4 Bro. C. C. 521. Crabtree v. Bramble, 3 Atk. 687). In Otway v. Hudson, it appeared that the legal estate remained outstanding in consequence of the obstinacy of the trustee, who had refused to surrender: but it seems that such circumstances would not now vary the rule in favour of the wife. The rule that dower does not attach on trust estate is frequently laid down without qualification, and is applied without inquiring into the causes from which it happens that the legal estate is not vested in the husband. A voluntary settlement made by the husband, though afterwards set aside as fraudulent against creditors, prevents his wife's right of dower from arising. Ex parte Bell, 1 Glyn and J. 282.

Whether a conveyance in trust privately made by the husband before marriage will bar dower.

It is said by *Lord C. B. Gilbert*, that a conveyance in trust, privately made by the husband on the eve of marriage, for the purpose of barring dower, would be deemed fraudulent, as being designed to deprive the wife of the provision given her by the common law. Lex Prœt. 267. For similar reasons, *Mr. Justice Wilmot* was of opinion in Drury v. Drury (*post*, chap. 10, sect. 1.) that an antenuptial jointure made without the wife's privity would be held to be fraudulent and void. On the other hand *Lord Hardwicke* treats it as clear, "that if a man before marriage conveys his estate privately, without the knowledge of his wife, to trustees, in trust for

(*a*) Perk. sect. 349. 4 Rep. 1 *b*.

[And, by analogy, the right to dower or free-bench does not attach upon lands of customary (*a*) or copyhold (*b*) tenure in which the husband's interest was equitable. And it follows also, that a widow will not be intitled to dower out of an estate agreed to be purchased by her husband, but not conveyed to him, or out of money agreed or directed to be invested in land (*c*).]

The creation of the trust, however, to have the effect of excluding the widow's title must be a fair transaction, such an one in which a Court of Equity would entertain jurisdiction to execute the trust; or the husband will be considered the legal owner of the estate, which will consequently give to the wife a title to dower.

Accordingly, in *Bateman* v. *Bateman* (*d*), *A* in the year 1691 purchased an estate in the name of his son *B*, to whom he delivered possession. *B* falling sick

---

himself and his heirs in fee, that will prevent dower." Swannock v. Lifford, Co. Litt. 208, note 1. And in Banks v. Sutton *sb. sup.* it was considered that the circumstance of a trust being created for the purpose of barring dower was an additional reason for allowing it to have that effect. See also Bottomley v. Fairfax, Prec. Ch. 336, and Show. Parl. Cas. 71. It may be observed that the reasons for which it has been held that a conveyance privately made by a woman during a treaty of marriage is *prima facie* fraudulent and void (*ante*, p. 162) do not apply with equal force to a conveyance made under similar circumstances by the intended husband. Since estates are now most commonly conveyed or settled so as to prevent dower from attaching, it is not necessarily to be presumed that the marriage was contracted by the woman in the expectation of becoming intitled to that provision, unless it appears that representations to that effect were made to her.

(*a*) Godwin v. Winsmore, 2 Atk. 525. (*b*) Forder v. Wade, 4 Bro. C. C. 520. (*c*) See 1 Ves. sen. 176. 3 Atk. 687. 1 Bro. C. C. 499. (*d*) 2 Vern. 436. Ed. by Raithby. It is to be observed, that in this case the legal seisin was in the husband: and the decree was probably founded on the presumption that the purchase was intended as an advancement for him. See Park on Dower, p. 108.

about a year afterwards, *A* procured from him a deed declaring that his, *B*'s name, was used in the purchase in trust for *A*. *B* recovered and still continued in possession of the estate, married, and died. His widow, claiming dower of this estate, brought her writ to recover it at law; upon which *A* filed his bill in equity to be relieved against these proceedings, but it was dismissed; the Court declaring the deed of trust to be fraudulent, as having been made with an intent to deceive creditors and purchasers; and *A* was injoined from giving the purchase deed in evidence at the trial at law.

No title to dower of an equity of redemption in fee.

Upon the principle requiring a *legal* seisin in the husband, if his estate be subject to a mortgage *in fee* at the time of the coverture, and remain so during its continuance, his widow will not be intitled to dower (*a*); for at law the whole legal estate of inheritance is in the mortgagee, and the right of redemption is merely an *equitable* title, incompetent to create a claim to dower.

Widow of mortgagee, after condition broken, is intitled to dower at law.

But prevented from claiming it by a Court of Equity.

But since the legal fee becomes vested in the mortgagee on non-payment of the money by the mortgagor according to the condition in the deed, it follows that his widow will be intitled at law to dower out of the estate (*b*). A Court of Equity, however, disappoints this title, considering the nature of the transaction; for in that Court the mortgagor had a right to redeem the land if the condition were broken, which right commenced at the date of the deed, so that this title overreached the legal seisin of the mortgagee acquired by him in consequence of a breach of the condition. Equity, therefore, (in analogy to similar instances at law, after mentioned, upon mere legal rights) acting upon its own creature, the equity of redemption in the

---

(*a*) Dixon v. Saville, 1 Bro. C. C. 326. (*b*) 1 Roll. Abr. 679, pl. 50. Nash v. Preston, Cro. Car. 191.

mortgagor, converts the husband mortgagee into a trustee for him *ab initio*, and defeats the legal title to dower.

The widow of a trustee is in the same situation.

Hence it appears that the widow of a *trustee*, although intitled to dower at law, which does not notice trusts, is not so intitled in equity (*a*). The principle is, that the trustee has no beneficial estate, but the *cestuique* trust is actually and absolutely seised of the freehold and inheritance in the consideration of a Court of Equity. The trust is the land in that Court, and the declaration of the trust is the disposition of the estate.

[It follows, that if a man after contracting for the sale of his estate marries and dies before executing a conveyance, his widow will not be endowed, since the husband became by the effect of the contract a trustee for the purchaser. And as free-bench, in general, attaches only on the copyhold estates of which the husband was seised at his death, the widow's right will be defeated by a contract of sale (*b*), or a covenant to surrender for valuable consideration (*c*), entered into during the coverture.]

Dower of estate borrowed to suffer a recovery.

[In a late case it appeared that a sum of money had been before *Lord Eldon*'s act (39 and 40 Geo. III. c. 56,) held upon trust to be invested in land in which the husband would have been tenant in tail. He borrowed an estate for the purpose of suffering a recovery: it was conveyed to him in fee, and immediately afterwards he conveyed it to the trustees: he thus became equitable tenant in tail. A recovery was suffered, and the estate then reconveyed to the former owner according to a previous agreement for that purpose. The Vice Chancellor thought that the husband did

---

(*a*) Noel v. Jevon, 2 Freem. 43. Bevant v. Pope, 2 Freem. 71. and see 2 Ves. sen. 634.

(*b*) Hinton v. Hinton, 2 Ves. sen. 631, 638. Ambl. 277.

(*c*) Brown v. Raindle, 3 Ves. 256.

not become a trustee for the person of whom it was borrowed until after the recovery was suffered; and that the wife's right to dower, having attached previously to the recovery, still continued (*a*).]

2. The husband's seisin must also be of an estate of *inheritance*.—Copyhold lands, therefore, are not in general (as we have seen) subject to dower; they are estates holden at the *will* of the lord only; yet by special custom the widow may be intitled to dower, or, more correctly speaking, to *free-bench*, out of them. And if the custom authorise it, she may take a moiety, or three parts out of four, or the whole, or even less than a third part of such estates (*b*). But this custom, as all special customs, will be construed strictly.

Seisin must be of an estate of *inheritance*.

Dower therefore does not attach to copyholds without a special custom.

Which is construed strictly.

Thus in *Linsey* v. *Dixon* (*c*), the widow pleaded to an ejectment a custom within the manor that the widow of every copyholder in fee simple, fee tail, or for life, should have and enjoy the copyhold for her life. The custom proved in support of the plea was, that such widows were only intitled *durante viduitate*; and the Court held that the custom given in evidence did not support the plea, since it was a less estate than the custom pleaded; and every custom was to be taken strictly.

3. The seisin of the husband must be of the *entire* inheritance at some time during the marriage, and not expectant upon the determination of a freehold interest carved out of it. If, therefore, the husband be merely seised of a *reversion* or *remainder* in fee upon an estate for *life* during the coverture, his wife will not be intitled to dower.

The husband's seisin must be of the *entire* inheritance.

No dower therefore of a *reversion* on an estate for *life*.

Suppose, then, a man to demise his estate to a person for life, reserving to himself and heirs a rent, and then to marry, and die before the lessee; his widow will not be intitled to dower either of the reversion or of the

Nor of a rent reserved upon the grant of an estate for life.

(*a*) Henley v. Webb, 5 Madd. 407. (*b*) Boraston v. Hay, Cro. Eliz. 415. (*c*) Dyer, 192.

rent: not of the reversion, because the husband had no legal seisin of the freehold during the marriage; nor of the rent, because it partook of the nature of the estate out of which it was reserved, and the husband had only a freehold interest in the rent, although it might descend to his heirs (*a*).

If the life-estate be surrendered by deed or in law to the husband, then dower attaches.

But if the lessee regrant the lands to the husband-lessor and his heirs, or the heirs of his body, for his the lessee's life, and then the husband dies, living the lessee, the widow will be intitled to dower; because the regrant amounted to a surrender of the lessee's life-estate, and let in the reversion, so that the husband became seised of the entire freehold and inheritance of the premises during the marriage (*b*). Again,

Interposition of an estate of freehold in trustees in remainder on the determination of husband's estate for life, will exclude dower.

If a gift be made to the husband for life, remainder to *B* and his heirs during the husband's life, with remainder to the heirs male of the body of the husband, his widow will not be intitled to dower; for the interposition of *B*'s estate of freehold between the husband's interest for life and his remainder in tail prevented the union of the two latter interests; the estate of *B* being vested, and might possibly take effect by the husband's forfeiture of his life-estate. It is that sort of estate which trustees have for preserving contingent uses limited after a preceding estate for life, and is not a contingent but a vested interest, to take effect by those ways and methods of determination to which such life-estate was subject when it was created (*c*). As the husband, therefore, in those cases is only seised of an estate of freehold during the marriage, the wife's title to dower cannot arise.

Contra, if the estate of the trustees be for *years* only.

But if the above intermediate estate had been for a

(*a*) Co. Litt. 32. 1 Roll. Abr. 676, pl. 40. Darcy v. Blake, 2 Sch. and Lef. 387. (*b*) 1 Roll. Abr. 677, pl. 25. (*c*) 18 Vin. Abr. 415. See Fearne's Conting. Rem. 217. Duncombe v. Duncombe, 3 Lev. 437. Doe v. Jones, 2 Barn and Cress. 248.

term of years only, it would not have prevented the wife's right to endowment, because such an interest does not exclude the present seisin of the husband of the entire freehold and inheritance in the estate; the possession of the grantee of the term being considered the possession of the owner of the freehold, and the term being a mere chattel interest (*a*).

Instance of a life-estate preceding the fee in the husband not preventing dower.

An instance may occur of an estate for life preceding the limitation of the fee to the husband not preventing the attaching of the widow's right to dower. This case depends upon the doctrine that a married woman may dissent after her husband's death to any estate given to her during the marriage; by which dissent the gift is as if it had never been made. If, therefore, lands be given to husband and wife, and to the heirs of the husband, the wife will be intitled to dower if she dissent to the gift of her life-estate; and then her husband will be considered as solely seised of the freehold and inheritance *ab initio* (*b*).

Effect of suspension of freehold in rents on title to dower.

The principle which governs the several cases before stated, applies also to instances where the *freehold* of the husband in seigniories, rents, commons, and the like, is *suspended* during the marriage; and when this happens, the husband, having neither seisin in fact, nor seisin in law, of the entire inheritance, a title to dower cannot arise (*c*).

No dower of a reversion or remainder upon a *vested* estate tail.

4. As in general the intervention of a life-estate will exclude dower of the reversion or remainder in fee in the husband, unless such freehold interest determine before his death; *à fortiori* if the intervening interest be a vested estate-*tail*, the wife will be equally excluded, except such estate expire during the marriage.

Suppose, then, lands be given to the husband for

(*a*) Bates v. Bates, 1 Ld. Raym. 326. (*b*) Perk. sect. 352-3. 3 Rep. 27 *b*. And it seems that the widow's disclaimer by deed will be sufficient. See Townson v. Tickell, 3 Barn. and Ald. 31. (*c*) Co. Litt. 32.

life, remainder to *A* in tail, remainder to the husband in fee, and the husband dies, living *A*, the widow will not be dowable; for her husband was intitled to an estate of inheritance only, expectant upon the estate tail, which is a seisin insufficient to create dower (*a*). But the law would have been different if the tenant in tail had died without issue *before* the husband, for then the husband would have been seised of the freehold and inheritance during the marriage (*b*).

But if the estate tail were *contingent*, and never vested, widow will be intitled to dower.

The last case is an instance of a *vested* estate tail preceding the ultimate limitation of the fee to the husband, which, during its continuance, prevented the husband's seisin of the entire inheritance. But if his estate in fee depend upon a *contingent* remainder in tail, which never vests, his widow will be intitled to dower, because her husband was *seised* of the inheritance during the coverture, subject only to be defeated by the vesting of the tenancy in tail, which never happened (*c*).

When the *descent* of the fee upon husband tenant for life will and will not intitle his widow to dower.

The result will be the same if such *contingent* remainder in tail be destroyed by the *descent* of the inheritance upon the tenant for life. But when the devolution of the fee upon the particular tenant will and will not destroy the contingent estates depends upon circumstances, which have been noticed in the first chapter of this work, that treats upon the husband's title to curtesy (*d*). It was there observed, that if the descent of the fee were *immediate* upon the heir of the person devising the several interests, it would not merge the life-estate given to such heir by the will, and upon which estate the contingent remainders were made to depend; but that the merger is complete in

---

(*a*) Perk. sect. 335. 1 Roll. Abr. 677, pl. 15. (*b*) Perk. sect. 337. (*c*) The contrary is said to have been ruled in Cordal's case, Cro. Eliz. 315. But the weight of the authorities is in favour of the position in the text. See Hooker v. Hooker, cited *post*. Park on Dower, p. 61. et seq. (*d*) Page 9.

all respects, except so far as it relates to the contingent estates, in relation to which the estate for life and the descended fee are separate and disunited. The consequence of this is, that if the contingent interests never arise, the wife will be intitled to dower for the reason before mentioned; but if they do arise, and continue during the marriage, then she will not be so intitled, because her husband is to be considered as having been seised of an estate for life only during the coverture. It was also observed in the same chapter upon curtesy, that if the descent of the fee upon the heir-tenant for life was *not* immediate, but *mediate* from the testator, as when it first descended to another person as heir, and from him to the tenant for life, or when it devolved from a devisee in remainder under the will, the estate for life would be merged, and the contingent remainders that depended upon it destroyed. The reasons for which distinctions were also particularly noticed in the chapter referred to. The effect, then, of this merger must be to intitle the wife to dower, since her husband became seised of the inheritance during the marriage. These distinctions will more clearly appear from the following authorities.

Where descent of the fee will not merge the estate for life.

First. When the husband's estate for life will not absolutely merge in the fee descended upon him as heir, but *sub modo* only, viz. to separate again on the happening of the events upon which contingent remainders supported by the estate for life were to take effect, and thereby necessarily rendering his wife's right to dower uncertain.

In the case of *Plunket* v. *Holmes* (*a*), it was resolved that the descent of the fee on tenant for life did not destroy the contingent remainder. The case was this: one devised lands to *T*, his eldest son, for life; and if *T* should die without issue living at his death,

(*a*) 1 Lev. 11. Raym. 28.

then to *L*, another of the testator's sons, in fee; but if *T* should have issue living at his death, then to the right heirs of *T* for ever. The testator died, and it was resolved that *T* was tenant for life, (because the limitation over was not upon a dying without issue generally, but was confined to a dying without issue then living), with the remainder in fee in contingency, and that the descent of the fee upon him, as heir, at the death of his father, did not destroy the contingent remainder.

So in the case of *Boothby* v. *Vernon* (*a*), it was taken for granted that the contingency was not destroyed by the descent of the fee. *A* devised lands to his sister (who was his heir at law) and her assigns for her life, and if she should marry, and have issue male of her body living at the time of her death (both of which events happened), then to such issue male and his heirs male for ever; but if she should leave no issue male at her death, then to *G* and his heirs for ever. The question respected the title of the testator's sister's husband to be tenant by the curtesy of the lands so devised to her; and the Court held that the inheritance was never executed in possession in the sister during her life (notwithstanding the inheritance descended on her), and her husband could not be tenant by the curtesy. It follows, therefore, that the descent of the fee did not merge her estate for life, or destroy the contingency. So in *Archer*'s case (*b*), notwithstanding the reversion in fee must have descended on *Robert* (the devisee for life), upon the death of his father (the testator), yet he was adjudged to be only tenant for life, with contingent remainder to his next heir male.

The above cases prove that when the heir of the devisor takes an estate for life under the will, and the

---

(*a*) 9 Mod. 147. (*b*) 1 Rep. 66.

fee by descent *immediate* from the testator, the particular estate of freehold is not merged so as to defeat the contingent estates dependant upon it. And it is to be remarked that in *Boothby* v. *Vernon* the daughter having married and left a son, the union of her estate for life and the fee in her (which, it is presumed, would have absolutely merged the former in the latter if she had left no male issue, and intitle her husband to curtesy) was by that event defeated *ab initio*, so that she was considered as having been seised of an estate for life only during the marriage, out of which seisin curtesy could not arise; and it is conceived that in such sense is to be construed the language of the Court in that case.

Where the descent of the fee will merge the estate for life.

Secondly. When the husband's estate for life will be merged by the descent of the fee upon him, and intitle his wife to dower.

In the case of *Kent* v. *Harpool* (*a*), *A*, the father, being tenant for life, remainder to his son, *B*, for life, remainder to the first son of *B*, remainder to the heirs of the body of *A*. *A* died before any son was born to *B*. The Court held the contingent remainder to the first son of *B* to be destroyed by the descent of the estate tail upon *B*.

So also in the case of *Hooker* v. *Hooker* (*b*), where lands were given to *A* and his wife for their lives, remainder to their son, *B*, for life, remainder to his first and other son and sons in tail, with remainder to *A* in fee. *A* and his wife died, living *B*, who afterwards died, without ever having a son, and leaving a widow. She was held to be intitled to dower; for upon the death of *A* and his wife, the fee-simple, which was limited to *A*, descended upon *B*, his son and heir, the effect of which was to merge *B*'s particular estate for

---

(*a*) 1 Ventr. 306. T. Jones, 76. (*b*) Hooker v. Hooker, Rep. temp. Hardw. 13. 2 Barn. K. B. 290. 232. 279.

life, and consequently to destroy the contingent remainder in tail depending upon it; so that during the marriage *B* became actually seised of the freehold and inheritance in the lands.

Upon the same principle, if husband and wife be tenants in *special* tail, with remainder to the right heirs of the husband, and the wife die without issue, and then her husband marries again, and dies, his second wife will be intitled to dower, because her husband, upon the death of his first wife without leaving issue, became *tenant in tail after possibility of issue extinct*, viz. for his life; which estate, meeting with the remainder in fee in him, became merged in it, by which means the husband was actually seised of the freehold and inheritance of the premises during the marriage; which seisin intitled his second wife to dower (*a*).

Dower attaches on a limitation to husband in fee in default of his appointment.

5. If an estate be limited to such uses as the husband shall appoint, and in default of appointment to him in fee, it is settled that he is *seised* of the inheritance until he exercise the power (*b*). His widow, therefore, will be intitled to dower if the power remain unexecuted.

But dower defeated by exercise of the power.

[Whether the exercise of the power of appointment by the husband will defeat his wife's right of dower, is a question which was formerly the subject of much discussion. In two recent cases (*c*) it has been decided, in conformity with the opinion intimated by *Lord Eldon* (*d*), that the inheritance vests in the appointee, discharged from the right of dower.]

No dower of an estate in joint-tenancy, except the husband survive the other joint tenant.

6. Of an estate holden by the husband in *joint-tenancy* his widow will not be intitled to dower if he die before the other joint-tenant; because the surviving

---

(*a*) 1 Roll. Abr. 677, pl. 10 (*b*) Cunningham v. Moody, 1 Ves. sen. 174. Smith v. Camelford, 2 Ves. jun. 698. Doe v. Martin, 4 Term Rep. 39. Doe v. Weller, 7 Term Rep. 478. See also 10 Ves. 263-5. (*c*) Ray v. Pung, 5 Madd. 310. 5 Barn and Ald. 561. Moreton v. Lees, cit. ib., and Sugden on Powers, 3d ed. p. 339. (*d*) 10 Ves. 266.

joint-tenant claims paramount the widow's title, viz. by survivorship under the original conveyance. If, therefore, lands be given to two men, and to the heirs of their two bodies begotten, and one dies in the lifetime of his companion, leaving a widow, she will not be intitled to dower, for her right to dower is excluded by the *jus accrescendi* of the surviving joint-tenant (*a*). In this case it appears that the husband was not at any time during the marriage seised of such a sole and perfect estate of inheritance as was sufficient to create a title to dower. The necessity of which seisin may be thus illustrated :—

Suppose an estate to be limited to two men and the heirs of the body of one of them, who marries, and dies, leaving issue and a widow; and afterwards the surviving joint-tenant dies; still the widow will not be intitled to dower, because the husband was at no period during the coverture seised of such an estate of inheritance in respect of which a right to endowment attached (*b*). That title, however, would have accrued if the husband had survived his companion, for then he would have been *solely* seised of a perfect estate in tail.

Nor if the same act which severs the joint-interest pass it to another person.

A severance of the jointure by the husband by an act which at the same time passes the fee of his moiety will not intitle his widow to dower.

Thus, if the husband and another person be joint-tenants in fee, and he make a feoffment of his moiety, and die, his widow will not be intitled to dower, neither in respect of the old estate, because the husband was not solely seised of it, nor of the new estate, because it never vested in him (*c*).

But dower attaches to a tenancy in common and lands held in coparcenary.

7. But the widows of tenants in common or *coparceners* may claim dower, since tenants in common and

---

(*a*) Co. Litt. 30. Litt. sect. 35. Perk. sect. 334. (*b*) Perk. sect. 334. (*c*) Co. Litt. 31 *b*.

coparceners have *several* inheritances which descend to their respective heirs; so that a title to dower necessarily arises out of the seisins of their husbands (*a*).

8. Although it be generally necessary, as before appears, that the husband's seisin should be that of an estate of inheritance, yet it may happen that his widow may be intitled to dower when he was in fact seised of an estate for life or possessed for years only. But such title is defective, since it springs out of the *tortious* act of the husband, as by his making a feoffment in fee. In such cases, however, the widow's right to dower will, it is presumed, be complete against the feoffee and the persons claiming under him; for the feoffee, by accepting the conveyance, *admits* that the husband was seised in fee and intitled to pass it; and the feoffee and such claimants are *estopped* from showing that the husband had a less estate (*b*): but as against the persons lawfully intitled to the lands upon the expiration of the husband's life estate or term for years the widow cannot claim dower, since they are not prevented from showing what interest her husband had in the premises. Her title to dower, therefore, can continue no longer than whilst the estate of the feoffee is permitted to endure.

Right to dower where husband, tenant for years or for life, makes a feoffment in fee.

Thus, if a husband, tenant for *years*, make a feoffment in fee, his widow will be intitled to dower against the feoffee and his heirs (*c*), but not, it is conceived, against the lawful owners after they have determined the estate of the feoffee. And as the like principle applies to a feoffment in fee made by a husband, tenant for *life*, it is presumed that the same law will prevail.

This distinction may be reconciled with the books.

Accordingly it is stated in *Brooke*'s abridgment (*d*), that, in the last case, the widow should not have

---

(*a*) Litt. sect. 45. (*b*) See Henley v. Webb, 5 Madd. 407. (*c*) Taylor's case, cited 1 Sir W. Jones, 317. (*d*) Tit. Dower, fo. 235, b. pl. 30.

dower, which is perfectly correct, if it be understood to apply as against the persons in remainder or reversion, and not the feoffee. Again,

Rolle in his abridgment (*a*), states, upon the authority of the year book (*b*), that if husband, tenant for life, grant a lease *pur autre vie* and die, his widow shall not have dower. The reason is apparent; the lessee by acceptance of the lease did not necessarily admit a fee in the husband, but merely that he had a power of demising for the life of some person other than himself. The lessee, therefore, not being estopped to show the husband's interest in bar to the widow's claim, such claim must be disappointed for want of the seisin of the husband of an estate of inheritance.

On the same principle, widows of persons seised of defeasible inheritances are intitled to dower against the heirs of their husbands.

The like principle which intitles the widow of a husband, tenant for life or for years, to endowment upon a defeasible estate of inheritance created and passed by his feoffment to his feoffee, also intitles the widow of the feoffee to dower against his heir, so long as such defeasible estate is allowed to continue. And, in other instances, if a husband become seised of a defeasible estate of inheritance, his widow will be intitled to dower during its continuance.

So that widow of conusee in fine levied by tenant in tail is dowable whilst there are issue in tail.

Thus, if tenant in tail convey his estate by *fine*, to *A* and his heirs, *A*'s widow will be intitled to dower so long as the estate tail continues, for the issue in tail are barred by the fine; but on failure of issue, the persons in remainder will be intitled to the estate discharged from the widow's dower (*c*). Again,

So also is widow of reversioner upon defeasible surrenders to him, whilst the interest surrendered continues.

If husband and wife, lessees for their lives, surrender the estate to the person in reversion, whereby the husband's life interest is merged, and that of his wife is also merged *sub modo*, *i. e.* subject to her election after her husband's death; although the actual seisin of the

---

(*a*) Tit. Dower, p. 676, pl. 45. (*b*) 3 Hen. 4. 6. (*c*) Seymor's case, 10 Rep. 95, b. 96.

husband of the freehold and inheritance by the surrender is defeasible by the wife after her husband's decease, yet if the reversioner die before the husband or his wife's election, the widow of the reversioner will, in the interim, be intitled to dower (*a*).

So also, if a tenant for life surrender or grant his estate to the husband (the reversioner), defeasible upon a *subsequent* condition, the reversioner's widow will be intitled to be endowed until the condition be broken (*b*). Again,

Widow, also, of bargainee, or releasee of tenant in tail, is dowable so long as tenant in tail lives.

If tenant in tail, by bargain and sale, or lease and release, purport to convey the estate to the husband in fee, and the husband dies, living the tenant in tail, the husband's widow will be intitled to dower against his heir during the life of the bargainor or releasor, and until she be evicted by the issue in tail; yet nothing in fact passed by the conveyance but a base fee, *descendible* to the heirs of the bargainee during the life of the tenant in tail (*c*). And the law will be the same when the subject so disposed of by tenant in tail lies in *grant*; as rents, commons, advowsons, &c. But

And if a fine be also levied, then her dower cannot be defeated whilst there are issue in tail.

if the tenant in tail had levied a fine in affirmance of the above conveyance, the title of the bargainee or releasee would not be impeachable whilst there remained any issue inheritable under the intail, and consequently his widow's right to dower could not be sooner defeated than upon the failure of such issue.

Dower attaches to reversions or remainders expectant on the determination of terms for years.

9. It has been before noticed, that in order to intitle the widow to a sure and perfect estate in dower, the law requires a seisin in the husband of the freehold and the inheritance *semel et simul*, and it has been shown that if the freehold and the inheritance in the husband be separated by an interposed estate for *life*, which continues during the marriage, and is not

---

(*a*) 1 Roll. Abr. 677, pl. 30. (*b*) Ibid. pl. 20. (*c*) 10 Rep. 96, and see Neville v. Rivers, *supra*, p. 11.

waivable by the tenant for life, such a separation will prevent a title to dower arising for the widow. If, however, the interposed estate be merely a *chattel* interest, as such an interest will not prevent the union of the freehold and the inheritance in the husband, his widow will be intitled to dower.

Thus, if the husband be seised for life, remainder to *A* for a term of years, remainder to himself in fee or in tail; or if at the time of the marriage the estate be subject to any other chattel-interests, his widow will be intitled to dower, subject to those interests. An instance of the first case has been already adverted to (*a*).

With a *cessat executio* at law during the terms.

Also, at law, if the husband, previously to his marriage, demise his lands for a term of years without a rent, his widow will be intitled to endowment of the reversion, with a stay of execution during the term.

But widow intitled to a third of the reserved rent.

And if he reserve a rent upon the lease his widow will be intitled to dower of a third part of it, as incident to the reversion (*b*). So also, if the husband's estate be subject to a mortgage for a term of years at and during the marriage, the widow's right of dower will attach to the reversion upon the expiration of the term, and not sooner. At law there is no difference whether the mortgage be satisfied or not, if the term be subsisting; but in equity if the mortgage be paid off, and the term therefore satisfied, the widow will be intitled as against her husband's *heir* or *devisee* to a removal of the legal impediment of the outstanding term, and to be *immediately* endowed (*c*). But if the mortgage be a subsisting charge at the husband's death, then, although the widow will be intitled to immediate endowment of the reversion, yet it is upon the terms of keeping down a third part of the interest. In regard to the mort-

If the terms outstanding be satisfied, widow is intitled to dower immediately, in equity, against an heir or devisee.

But if they be unsatisfied mortgage terms, she must keep down one-third of the interest.

(*a*) *Supra*, p. 360. (*b*) 1 Roll. Abr. 678, pl. 7—8. Co. Litt. 32. Stoughton v. Leigh, 1 Taunt. Rep. 402, stated *supra*, p. 342. (*c*) Hitchin v. Hitchin, Pre. Ch. 133. Ward v. Dudley, Pre. Ch. 241. See chap. 11, sect. 2.

gagee, the widow is liable to be called upon for payment of the whole debt, or to be foreclosed. And if she discharge the demand she will be at liberty to hold the estate until she be reimbursed what she paid beyond her proportion as tenant for life of a third part of the lands (*a*). That proportion, by the old rule, was a third of the principal; but according to the modern rule now established in regard to the proportions of fines to be contributed by tenants for life and the persons in remainder upon renewals of leases, it is presumed that the amount of her contribution will depend upon the value of her life, in estimating which, her age, &c. are to be considered (*b*). The distinctions prevailing in equity, in regard to the widow's title to dower against a *purchaser* of the estate for a valuable consideration, are reserved for consideration in the second section of the eleventh chapter.

Another instance of a chattel interest not excluding the wife from dower may occur, as in the following case:

Semble that dower attaches on a seisin subjected to a chattel interest in executors to pay debts,

Suppose *A* to devise his estate to his *executor* for the payment of debts, and after the discharge of them, to his son in tail; that the son married and died before the debts were paid, leaving a widow; it seems that

---

(*a*) Palmes v. Danby, Pre. Ch. 137. Hamilton v. Mohun, 1 P. W. 118. Williams v. Wray, Prec. Ch. 151. 1 P. W. 137. Squire v. Compton, 2 Eq. Ca. Ab. 387. 9 Vin. Ab. 227. (*b*) White v. White, 9 Ves. 554. But the rule of contribution to fines paid on renewal does not apply to mortgages, with respect to which the tenant for life contributes only the interest for his life (9 Ves. 560. 5 Ves. 107.) And by analogy it seems that if a dowress pays off the mortgage and is afterwards redeemed, she will be charged in the account with one-third of the interest, and will be allowed one-third of the rents and profits, and that she will hold the share which will be assigned to her subject to the payment of one-third of the interest during her life. This is of course upon the supposition that the husband's personal estate is either not liable or not sufficient to exonerate his real estate from the mortgage.

she shall have dower (*a*), because the interest in the executor was merely a chattel (*b*), so that the freehold and inheritance vested in the son upon his father's death, of which he was actually seised during the marriage. The endowment, however, cannot take place until all the debts have been satisfied.

or subject to statutes merchant, &c.

Upon the same principle it is presumed, that if the husband's seisin of the inheritance during the marriage be subject to a statute-merchant, statute-staple, or to an elegit, the wife's dower will attach, since those estates are but *chattel* interests (*c*).

As to *instantaneous* seisins of husband intitling his widow to dower.

10. It is not necessary to the wife's perfect title to dower in her husband's freehold estates that the seisin of her husband should continue until his death. It is sufficient if he be *beneficially* seised of a lawful estate of freehold and inheritance at any period during the marriage, and if for an *instant* only (*d*). This was curiously exemplified in the case of *Broughton* v. *Randal* (*e*). A father was tenant for life, remainder to his son in tail, remainder to the right heirs of the father. Both of them were attainted of felony, and executed together. The son had no issue, and the father left a widow. Evidence was given of the father having moved or struggled after the son, and the father's widow claimed dower of the estate, and it was adjudged to her (*f*). The principle appears to be this; that the instant the father survived the son, the estate for life of the father, united with the remainder in fee limited to him upon the determination of the vested estate tail in the son, so that the less estate having merged in the greater,

---

(*a*) Hitchens v. Hitchens, 2 Vern. 403. S. C. Prec. in Ch. 133. 2 Freem. 311. (*b*) Co. Litt. 42. (*c*) Co. Litt. 42. (*d*) See Henley v. Webb, 5 Madd. 407. cited ante, p. 358. (*e*) Noy, 64. Cro. Eliz. 503. In the latter book the case is somewhat differently reported. (*f*) With respect to questions of survivorship between persons perishing by the same calamity, see Taylor v. Diplock, 2 Phill. 261.

the father became seised of the freehold and inheritance for a *moment* during the marriage, to which dower attached itself.

When not.

But if the instantaneous seisin be merely *transitory*, *i. e.* when the very same act by which the husband acquires the fee, takes it out of him, so that he is merely the conduit for passing it, and takes no interest, such a momentary seisin will not intitle *his* widow to dower. In order to illustrate this,

If lands be granted to the husband and his heirs by a fine, who immediately by the same fine renders it back to the conusor, the husband's widow will not be intitled to dower of such an instantaneous seisin (*a*).

Upon similar principle, if the husband be lord of a manor, and he accept a surrender from a copyhold tenant, and re-grant the estate by copy, his widow cannot claim dower (*b*).

Copyholds are exceptions to the general rule, that the husband need not to continue seised up to the period of his death in order to intitle widow to dower.

Exception, however, must be made to the above proposition, that the continuance of the husband's seisin to his death is unnecessary in order to create a title to dower, when such title is not founded upon the general law, but upon particular custom, as in the instance of copyholds. For since it is custom that gives the right, and is to be construed strictly, as it has been before observed (*c*), the widow must derive her title precisely according to its directions.

If the custom, then, require a seisin at husband's death, and he be bankrupt, and an assignment of his property

Suppose, then, the husband to be seised of a copyhold of inheritance, and the custom of the manor to allow the wives of copyholders, *dying tenants*, freebench; if the husband become bankrupt, and the commissioners sell and convey the copyhold to a purchaser by bargain and sale, but between the date of the deed and the enrolment of it the husband dies, and then the enrolment is made in due time, his widow will not be

---

(*a*) Dixon v. Harrison, Vaugh. 41. Cro. Car. 191. Co. Litt. 31, b. (*b*) Sneyd v. Sneyd, 1 Atk. 442. (*c*) *Supra*, p. 359.

intitled to dower. The reason is, that the husband did not die seised of the copyhold as required by the custom (*a*), the enrolment having relation to the date of the deed.

be made, but he die *before* it be enrolled, enrolment *afterwards* will defeat dower,

In the above case the custom required the husband to be seised of the estate at his death. But if the custom be silent as to that, and intitle generally the widows of copyholders to dower or freebench, it would seem that in such case also the husband's seisin at his death is necessary; for the widow has not, in these cases, an *initiate* title to freebench during the marriage, as at common law, but only a *conditional inception* of title (*b*). And in *Godwin* v. *Winsmore* (*c*), *Lord Hardwicke* observed, "that freebench was merely a widow's estate in such lands as the husband *died seised of*, not that he was seised of during the coverture, as dower was (*d*)."

and the law is the same although the custom be silent as to husband's continuing seised.

11. It may happen that the freehold estate of inheritance of which the husband was seised during the marriage may be determined during his life or afterwards. This may be the case where his seisin depends upon the acquiescence of persons having a lawful title to the estate, as in the instance before given of his seisin of a defeasible estate of inheritance (*e*); or, by the *natural* expiration of his interest; or, upon an event mentioned in the instrument creating the estate, but not disturbing or over-reaching his past seisin; or, by a condition which defeats such seisin *ab initio*; or, by the title of persons to the estate at the time of the marriage, which will have the same effect.

As to widow's title to dower, when husband's seisin or estate *naturally* expires or is *defeated*.

Since the widow's title to indefeasible dower depends upon and arises out of the lawful seisin of her

---

(*a*) Parker v. Bleeke, Cro. Car. 568. (*b*) Carth. 275. 2 Term Rep. 580. (*c*) 2 Atk. 526. (*d*) But the widow may by special custom be intitled to freebench of the copyholds of which her husband was seised at any time during the coverture. See Watkins on Copyholds, vol. 2, p. 73. *note*. (*e*) *Supra*, p. 369.

husband, it is perceivable, that in some of the above cases she will be intitled to it, and in others not. I shall consider each case in its order, with the exception of the first, as it has been treated of in a former page (*a*).

Widow intitled to dower, although her husband's estate or seisin *naturally* determine.

So favourably disposed is the law to the title of dower (a right of its own creation), that although the dowable estate naturally determine, it will be considered still to subsist, in order that the widow may hold her dower out of it during her life.

Thus, if the husband be donee in tail and die without issue, by which event the estate tail is naturally determined, and the donor enters, yet the husband's widow will be intitled to dower of a third part of it (*b*). And if a rent were reserved upon the grant, she will be liable to pay a third of its amount to the donor or his heirs; for although it became extinct upon the death of the tenant in tail without issue, justice required that if a third part of the estate out of which it was payable was continued in favour of the widow for her life, one third of the rent should have the like continuance in favour of the donor and his heirs (*c*).

But if a rent be reserved to donor of the estate, widow must pay one-third of it to him.

Distinction between the widows of the donor and the donee in tail as to dower after the natural expiration of the estate tail.

But a distinction must be made between the widow of the donee in tail and the widow of the donor: accordingly, if in the case last stated the question had been, whether the widow of the donor should have dower out of the rent which had become extinct by the death of the donee in tail without issue, the correct answer would be, that she was not; because there was

---

(*a*) Ibid. (*b*) Perk. sect. 317. In Chaplin v. Chaplin, 3 P. W. 230, it was said that this rule would not apply to the case of a rent created *de novo*, and granted to the husband in tail without remainders over; but that upon his death without issue, his widow would not be endowed. This distinction is, however, very questionable. See Co. Litt. 30. *a.* *n.* 2. Jenk. p. 5. Park on Dower, 159. (*c*) Co. Litt. 241. Perk. sect. 431. Plow. 155.

no person in existence who could be called upon to pay any rent; and in lieu of dower of such rent the donor's widow, upon the determination of the estate tail, became dowable of the estate itself, of which in that event he became seised in fee (*a*).

[If the husband be seized in fee, and die without heirs, the wife will be entitled to dower, as against the lord by escheat (*b*).]

Semble, that dower attaches if husband's estate ceases *before* its *natural* expiration, but upon an event *not defeating* his previous seisin.

The next consideration is the wife's title to dower after the estate of her husband has determined, *before* its natural expiration, by the happening of an event particularly mentioned in the instrument creating it, but without disturbing or over-reaching his prior seisin; an instance of which may occur, if *A*, being seised of lands in fee, covenant to stand seised to the use of himself and his *heirs until C*, his middle son, take a wife, and afterwards to the use of *C* and his heirs. Now, should *A* die, and the lands descend to *B* his heir, who also dies leaving a widow, and then *C* marries, —it has been said that the widow of *B*, the heir of *A*, should not have dower; because the estate of *B* determined by express limitation or provision made in the instrument before her title to dower commenced, and therefore her dower, which was derived out of *B*'s seisin, could not continue longer than the original estate. The very case came before the Court *Tr.* 8 *Car. Rot.* 1343, but no judgment was given, the Court having been equally divided in opinion. It is pre-

---

(*a*) Fitz. N. B. 149. (G.) And if the estate tail determines after the husband's death, the wife's dower of the rent will cease; and it seems that she will not be endowed of the land, her husband not having been seised of it during the coverture. And so if the grant contained a clause of re-entry for nonpayment of the rent, and after the husband's death the heir entered under this clause, it seems that the wife would not be endowed. Perk. 317. (*b*) Jenk. p. 5. Bro. Dower, 64. 1 Eden. 193. See Watkins on Copyholds, vol. 2. p. 85.

sumed, however, that in this case the widow would be entitled to dower, for the reasons and upon the authorities mentioned in the chapter upon "Curtesy" (*a*).

It is conceived that the principle upon which the widow is acknowledged to be intitled to dower after the natural determination of her husband's estate in the land in respect of which her title attached, equally applies to the case last supposed, which principle is, that the husband having at some period during the marriage been seised of an estate out of which a title to dower arose, although such estate determine by any event afterwards not defeating but *determining* the husband's seisin, the law so favours this right of the wife, which was initiate, as to preserve and continue it after the estate which supported it expired.

Contra, when his seisin is *defeated* by entry of donor for breach of a *condition* expressed in the deed,

But the case is obviously different when the seisin of the husband is *defeated* by a *condition* annexed to the grant; for if the donor enter for a breach of it, the husband is considered as never having been seised at all; the donor is in of his original estate, which overreaches and defeats all the rights, &c., which attached to the intermediate seisin of the husband, one of which was his widow's right to dower.

Thus, if husband feoffee or releasee in fee upon condition marry, and the feoffor or releasor enter for a breach of it, and then the feoffee dies, his widow will not be intitled to dower; because the entry of the feoffor or releasor defeated the seisin of the feoffee or releasee *in toto*, and all rights appendant or incident to it (*b*).

or by implication of law.

The result is the same when the condition is annexed by *implication of law*. Accordingly, if there be father and son, and the father being seised in fee simple of

---

(*a*) Chap. 1. sect. 5. See also some remarks on this subject in the Addenda at the end of vol. 2. (*b*) Co. Litt. 201, 202 Perk. sect. 311, 312.

an estate give it in exchange to a stranger for another estate, and then dies,—the son afterwards marries and enters upon the estate taken in exchange; but the stranger being evicted enters upon the estate given by him in exchange to the father. Under these circumstances, the widow of the son will not be intitled to dower of this last estate; because the *son's* seisin was entirely defeated upon the eviction of and entry by the stranger, in consequence of the *implied* condition annexed to all exchanges, that if either party be evicted of the thing received in exchange through the defect of the other's title, he shall return to the possession of his own; and this has relation to the period of making the exchange (*a*).

The principle of the last case explains the rule why a widow shall not be endowed of land given and taken in *exchange* by her husband during the marriage (*b*); of both of which her husband was seised, and to both of which her dower attached: for if she were allowed dower out of both estates, and endowed of them accordingly, then, so soon as her dower was assigned out of her husband's lands given in exchange, her endowment of those which were accepted by him in that transaction would be defeated by the entry of the owner of them previously to the exchange, under the *implied* condition annexed to exchanges by the law; so that the widow could not possibly enjoy permanent dower in both estates. The law, therefore, in order to protect her against improvident exchanges by her husband of his lands, which might be injurious to her right to dower, permits her *election* to endowment out of either of the estates given or accepted in exchange, but does not allow her dower out of both.

Defeasance of husband's seisin by a title *before* marriage defeats right to dower.

In truth, in all other cases, if the husband's seisin be defeated by a lawful title existing *prior* to the mar-

(*a*) Perk: sect. 309. (*b*) Co. Litt. 31, *b*, and *supra*, p. 347.

riage, his wife's initiate title to dower will determine with it; for when the person so intitled recovers the estate, it will have relation back beyond the marriage, and be attended with the like consequences as the entry of a donor for a condition broken, which was the subject last considered.

This shown in the instance of parceners, when one was evicted of his allotted share after partition made before his marriage,

Thus, if two coparceners make partition of their estate, and the one marries, and the other is impleaded in respect of his allotted share, and he prays in aid the other coparcener, who joins with him; if judgment be pronounced for the demandant against the tenant for the share, and that the tenant shall have *pro rata* of the part which remained in the possession of his companion the husband coparcener, and the husband dies, his widow will not be intitled to dower of that which was recovered from her husband *pro rata*; because the recovery has relation to the death of the common ancestor, and consequently the husband's seisin of it is defeated by a title prior in time to the marriage (*a*).

and in cases of discontinuances and remitter.

So, also, if tenant in tail discontinue in fee, and then marries, and either disseises or takes back the estate from the discontinuee to himself and wife in tail or in fee, and dies seised, leaving issue,—his widow will not be intitled to dower; because the issue in tail is *remitted*, which defeats *ab initio* the estate of which the husband was seised, together with the right to dower that attached to it (*b*). Again, if the husband being tenant in tail *general*, make a feoffment in fee, and retake an estate to himself and his wife in *special* tail, and then his wife dies, and he marries again, has issue, and dies,—his second wife will not be dowable of those lands; because, by the remitter of the issue to the *general* tail, the seisin of her husband in *special* tail, which alone he had during the second marriage, was totally defeated (*c*), as in the preceding case.

(*a*) Perk. sect. 310. (*b*) Fitz. N. B. 149 (*F.*) Co. Litt. 31, *b.* Dyer, 41, *a.* (*c*) Perk. sect. 302. Co. Litt. 31, *b.*

So, also, if there be grandfather, father, and son, and the grandfather being seised of three acres of land in fee, marries and dies, upon which the lands descend to the father, who dies either before or after entry, leaving a widow intitled to dower, and then the son enters and *endows* his grandmother of *one* acre, who soon after dying, the father's widow claims a right to endowment out of the same acre, such claim will not avail (*a*); because the father's seisin of an entire estate of inheritance in this acre was defeated *ab initio* by the grandmother's endowment; by which act her title to dower was *consummate*; so that, in fact, the father was seised of no other estate during the coverture than a *reversion* in fee depending upon an estate for life, viz. upon the estate for life of the grandmother; a seisin which, as it has been before shown (*b*), is insufficient to create a title to dower.

If there be two widows dowable, and the first be endowed, the second widow's right to dower is defeated.

In the last case it is observable, that by *endowment* the legal title of the grandmother was complete, and that the endowment had relation to the grandfather's seisin at his death, and her estate was a continuance of it, and a defeasance *pro tanto* of the father's seisin *ab initio*, which only commenced at the grandfather's death. All depended upon the *endowment*, by which the grandmother's title was rendered complete, and by which she was in of her husband's estate immediately from his decease. Let us simplify the above case, and put it thus: Suppose that the ancestor of a married man dies, upon which he *endows* his ancestor's widow of a third of the lands which descended upon him as heir, and then also dies, his widow will not be intitled to be endowed of the third assigned in dower to his ancestor's widow; but she will be dowable out of the remaining two thirds.—So intitled also will the father's

But she will be intitled to dower out of the remaining two thirds.

(*a*) Co. Litt. 31. (*b*) *Supra*, p. 359.

widow be, in the former case, out of the remaining two acres.

The maxim of *Dos de dote peti non debet* applies only when the first widow has been endowed. Her mere right to endowment will not prevent that of second widow.

It is to such cases as these that the maxim, *Dos de dote peti non debet*, applies; for, where no dower has been actually assigned, the rule is inapplicable; the heir's seisin in the last case, and the father's seisin in the former, are not disturbed (*a*). It therefore may be considered as settled, that the mere right or title to dower in the first widow will not prevent a second from endowment.

Thus, in *Hitchens* v. *Hitchens* (*b*), lands, subject to a title to dower, were devised to a person in fee, who died, leaving a widow; the widow sued for her dower, and recovered a third part of the whole, without any regard to the title of dower in the widow of the testator, who did not put her claim in suit. It was holden by the Court, that the testator's widow not having recovered her dower, it was to be laid out of the case; and the dower of the devisee's widow was not therefore to be looked upon as *dos de dote*.

But under particular circumstances, second widow may be intitled to dower of lands assigned to the first, after the first's death. When grandfather conveys the inheritance to his son.

It is essential, however, to the exclusion of the second widow surviving the first from dower of the third part of the estate assigned to the first widow, that the husband of the first should die seised of the inheritance; for if he, during his life, enfeoff or convey it to the husband of the second widow, who endows his (the feoffor's) widow, and dies, then after her death the widow of the feoffee will be intitled to endowment of a third of the part assigned in dower to the widow of the feoffor; because the feoffee had a lawful seisin of the inheritance *before* the death of the feoffor, viz. from the date of the conveyance in respect of which his widow became dowable in the whole estate, including

---

(*a*) See Gilb. "Dower," 395. The rule *Dos de dote peti non debet*, extends to copyholds. See Baker v. Beresford, T. Raym. 58. 2 Sid. 1. 9. (*b*) 2 Vern. 403.

the third of it, which the feoffor's widow was intitled to have assigned to her. It is obvious that the endowment of the first widow could not, as in the instance before given, defeat the title of the second by avoiding the seisin of the feoffee (the husband of the second widow), and converting his seisin of it from the feoffor's death into a reversion in fee upon an estate of freehold for the wife of the first widow; since the feoffee's seisin did not depend upon, but was paramount to, the death of the feoffor, upon which event alone the right of the first widow to an estate for life was consummate: and although the endowment of the first widow had the effect of drawing back out of the feoffee's seisin in fee an estate for her life, commencing from the death of the feoffor, yet it did not over-reach or devest that seisin, but left it, subject to her interest for life, liable to all the claims which the feoffee had created upon it, and to all the rights which the law had attached to it, one of which was his widow's title to dower out of the whole. The necessary consequence therefore is, as it has been stated, that if the second widow survive the first, she will be dowable of the third which had been assigned in dower to the first widow (*a*).

The time and person to whom dower is *first* assigned, may also alter the rights of the parties in the case before adduced of grandfather, father, and son.

Or when the second widow is endowed *before* the first.

Thus, if the father's widow be endowed by the son *before* the grandmother, and the latter recover the acre from the mother,—the mother may claim the acre again after the grandmother's death; because by the endowment the mother became seised of the legal freehold for her life; and the recovery of the acre by the grandmother did not defeat such estate *in toto*, but during her life only. The mother's estate for life;

(*a*) Co. Litt. 31. Perk. sect. 315, and see Gilb. "Dower," 396. and Bustard's Case, 4 Rep. 122, *a* and *b*.

therefore, being in relation to herself a larger interest, in consideration of law, than an estate *pur autre vie*, viz. during the grandmother's life, the mother retained a reversionary interest in the acre, after it was recovered from her, expectant upon the grandmother's death, on the happening of which event the mother is intitled to reclaim the acre in dower; but if she had been re-endowed by the heir of another acre, in lieu of the one which was recovered from her, he may re-enter upon it (*a*).

A mere *right* of *entry* in the husband will not create a title to dower.

12. It has been before observed (*b*), that there must be a seisin in the husband of the inheritance, either in fact or in law, to intitle his widow to dower. If, therefore, he only have a right of entry upon the lands, and he does not exercise it during the marriage, so as to obtain seisin of the inheritance, no title to dower can arise to his widow. To exemplify this,

As an exchange at common law, not perfected by entry.

Suppose *A* and *B* exchange estates under conveyances at common law, and *A* enters upon the lands of *B* given in exchange; *B* then marries, but dies without having entered upon the estate of *A*, accepted by him in exchange: *B*'s widow will not be intitled to dower of that estate, because, till entry, *B* was not seised of the inheritance either in fact or in law (*c*).

Contra, if the exchange be completed by conveyance under the statute of uses.

But the reader will notice, that if this exchange had been made by lease and release under the statute of uses (*d*), which transfers the legal seisin and possession to the use, the entry of *B* would have been unnecessary, and in that case his widow would have been intitled to dower. Again,

Also non-entry for the breach of a condition will prevent dower.

If a person enfeoff another upon a condition to be performed on the feoffee's part, and afterwards marry, and then the condition is broken, but the feoffor dies before entry, his wife will not be intitled to dower (*e*).

(*a*) Co. Litt. 31. Perk. sect. 316.
(*b*) *Supra*, p. 359.
(*c*) Perk. 369. Co. Litt. 50 *b*. 51 *b*.
(*d*) 27 Hen. 8. chap. 10.
(*e*) Perk. sect. 368.

So also if a man bargain and sell lands to another person and his heirs, with a proviso that if a particular act were done the bargain and sale shall be *void*; and afterwards the bargainor marries, and then the condition is broken, but before entry for the breach the bargainor dies; his widow will not be intitled to dower (*a*); because for want of re-entry by the bargainor, the estate of the bargainee was not revested, so that at no time during the marriage the bargainor was seised of the inheritance in the premises.

Non-entry under a proviso in a conveyance by husband before marriage, determining the estate, prevents dower;

It is conceived, however, that if in a conveyance to uses it had been declared that upon a breach of the condition the conveyance should be to the *use* of the husband and his heirs, then that by virtue of the statute of uses, he would have been seised of the fee without an entry, and his widow in consequence intitled to endowment.

except upon the proviso not being complied with, the estate was limited to the *use* of husband in fee.

13. The same principle which prevents a title to dower upon a mere right of entry in the husband during the coverture, will equally prevent that title arising, when the husband during that period has only a right of *action* to recover his estate.

Dower will not arise upon a mere *right* of *action* in the husband.

Suppose, then, a man to be disseised, and the disseisor (after being in peaceable possession of the estate for five years (*b*)) to die seised, upon which the lands descend to his heir; the entry of the disseisee would be tolled or *taken* away. Also suppose the disseisee to marry, and then to die, his widow will not be intitled to dower, since there was no seisin in the husband during the coverture, but a right of action only.

Instance when disseisee's entry is tolled after a disseisin;

So also if the husband had commenced an action against the heir of the disseisor, but after recovering judgment, died before execution, his widow would not be dowable, because her husband was not during the

and although he recover judgment, if he die before execution his widow will not be dowable.

(*a*) 6 Rep. 34.

(*b*) See stat. 32 Hen. 8, c. 33.

marriage seised, either in fact or in law, of the inheritance of the lands (*a*).

Nor will dower arise when the husband's title depends upon a void conveyance.

14. The same reasoning applies where the husband's title to seisin of the inheritance depends upon a defective instrument or conveyance.

Instance—a bargain and sale void for want of enrolment.

Accordingly, if the husband's title to the estate depend upon a bargain and sale (which, by the statute of Henry the eighth (*b*), must be enrolled within six months after its date), and he die before the enrolment, but after the expiration of the six months, his widow will not be intitled to dower (*c*), because the bargain and sale was void, and consequently there was no seisin in the husband.

The reverse, however, would be the case if the husband had died within the six months, and the bargain and sale had been enrolled within that period; for the enrolment has relation to the date of the bargain and sale, so that the husband in his lifetime was seised of an estate of inheritance (*d*).

Widow may elect between *two seisins* of her husband of the *same* estate.

15. It may happen, that the husband becomes seised of the *same* estate at two or more distinct periods during the marriage. In these instances, the widow is at liberty to elect of which seisin she will be endowed.

Thus, if the husband were seised in fee, and conveyed away the estate, and then took it back again in fee or in tail, his widow may elect whether she will be endowed upon the first or second seisin (*e*); the exercise of which right may be of much consequence

---

(*a*) Perk. sect. 370. 375. (*b*) 27 Hen. 8. chap. 16.
(*c*) Dimmock's case, Ow. 149. (*d*) See Cro. Car. 217. 568. This seems to be the better opinion, though some of the authorities are at variance. See Gilb. Uses, 96, and Mr. Sugden's *note*, ibid. 292. Sanders on Uses, vol. 2. p. 64. Shep. Touchst. 226. Dimmock's Case, *ub. sup.* S. C. Cro. Jac. 408. Hob. 136. (*e*) Co. Litt. 33.

to her, as will appear when the effects of assignments of dower are afterwards considered.

And if the widow preclude herself of this right of election, by joining in a fine with her husband, and he take back the same estate in fee or in tail, she will be entitled to dower of this *second* seisin (*a*).

And she will be dowable of the second seisin, if she be barred of the first by her fine.

With respect to the *issue*, in relation to the widow's title to dower, the birth of any is not required, as we have seen that it is in order to found a right to curtesy. But the issue which might have been born, must be such as by possibility might have inherited the estate.

Of the issue as to dower.

If, therefore, a man seised of lands in fee-simple have a son by his first wife, and after her death marry a second, she will be intitled to dower of his lands, for her issue might by possibility have been heir to and inherited the estate after the son's death. So it is if the husband be seised to him and to the heirs of his body in tail general; and for the same reason, if the husband be donee in *special* tail, holding lands to him and the heirs of his body begotten on *Jane* his then wife, she will be intitled to dower, although there be no issue, by reason of the possibility there was of her having such as were inheritable; but if she happened to die before her husband, and he married a second wife, this wife would not be dowable of the lands in special tail, for her issue could not by any possibility inherit them *per formam doni* (*b*).

III. We shall now consider, in their order, when, and by whom, and of what, and how dower is to be assigned, and the remedies for excessive assignments.

Before entering upon the consideration of the above particulars, I must observe, that a widow is not intitled to enter upon her third part of the estate until it has been duly assigned to her by the heir or other com-

Dower must be assigned before widow can lawfully enter.

(*a*) *Note* 5 to Co. Litt. 33. (*b*) 2 Black. Com. 131. Litt. sect. 53. 8 Rep. 36. Cro. Jac. 615.

petent authority (*a*). This is required not only for notoriety to the public, as to the owner of the lands, to enable them to implead the tenant, but also to intitle the lord of the fee to demand the heir's services in respect of the estate so holden; for the heir by his entry becomes tenant to the lord, and the widow is immediate tenant to the heir by a kind of subinfeudation which is completed by the assignment (*b*); and it is not necessary that the assignment should be by deed (*c*).

And the assignment need not be by deed.

When dower is to be assigned.

1. The first thing to be considered is, *when* dower is to be assigned.

The widow is intitled to be endowed immediately after her husband's death; and dower ought to be assigned to her within *forty* days after the happening of that event: in the mean time she is intitled at the common law, confirmed by *Magna Charta* (*d*), to remain in her husband's capital messuage or other dwelling-house, of which she is dowable, for the space of forty days, and to be supported *de bonis viri* (*e*). This title of residence is called the widow's *Quarantine*. But if she marry during these days, or depart from her husband's house (to which she will not be permitted to

Widow's Quarantine.

(*a*) Co. Litt. 34. *b*. 37. Dall. 100. And hence a widow before assignment of dower has not such an interest as to gain a settlement, or to be irremoveable from the parish, unless she be resident on the premises. Rex v. Northweald Basset. 2. Barn and Cress. 724. But if she resides on the premises for forty days after the death of her husband, being irremoveable during that period, she gains a settlement, which however is not communicated to a second husband. Rex v. Painswick. Burr. Sett. Cases, 783. By stat. 20. Geo. 3. chap. 17. sec. 12, if the husband died seised, receipt of the profits of the dower, without assignment, is sufficient to entitle a second husband to a vote for the county. (*b*) 2 Black. Com. 135. Perk. sect. 393. (*c*) Post. p. 392. (*d*) Chap. 7. (*e*) Co. Litt. 32 *b*. 34 *b*. 2 Inst. 17. Jenk. 284, pl. 16. But see *contra* as to her right to maintenance. F. N. B. 162. in marg.

return for the remainder of the time), her right to quarantine determines.

Plea of it.

In pleading quarantine, the widow must show with *certainty* the period when her husband died, and the time of the forty days after (*a*). And if she be evicted by the heir or ter-tenant, she is intitled to the writ *de quarantinâ habendâ* (*b*), the form of which is given in *Fitzherbert's Natura Brevium* (*c*).

Writ de quarantinâ, &c.

2. The next consideration is, *by whom* dower is assignable.

Person assigning dower, must be seised of the freehold.

The person by right intitled to assign dower, when a court of law is not resorted to for the purpose, is the heir, or whoever may be the owner of the freehold (*d*); it being settled that an assignment of dower cannot be made by any person who has not a freehold in the estate, or against whom a writ of dower does not lie. For this last reason, it is said that a guardian in *socage* cannot assign dower (*e*); however, tenants by elegit, by statute staple, statute merchant, or for terms of years, are incompetent to make a legal assignment of dower, since they are possessed of mere chattel interests (*f*).

Therefore not by guardian in socage, or tenants by elegit, &c.

Minority of heir is no objection to his assignment.

If the heir be a minor, he is notwithstanding competent to the assignment of dower; because he would be obliged to do so in a suit, in which he would not be permitted to take advantage of infancy, so as to prevent an immediate assignment, since the widow's title to her dower is urgent, it being necessary for her immediate support (*g*).

Assignment may be by a person seised of a *tortious* freehold.

But it is not necessary to the validity of the assign-

(*a*) Kettillesby v. Kettillesby, Dyer. 76 *b*. (*b*) Co. Litt. 34 *b*. (*c*) Page 162. (*d*) Co. Litt. 34 *b*. (*e*) But dower might have been assigned by guardian in chivalry. Co. Litt. 35. *a*. 38 *b*. 9. Co. 17. (*f*) Co. Litt. 35. Perk. sect. 404. 6 Rep. 57 *b*. (*g*) 1 Roll. Abr. 137. 681. Gore v. Perdue, Cro. Eliz. 309.

ment, that the estate in the person making it should be a *lawful* freehold; because assignment of dower is a legal obligation upon the tenant of the freehold, whether he obtain it by right or by wrong; and if by wrong, the widow is not obliged to wait for an assignment until the heir thinks proper to enter and defeat the tortious estate, an event which may never happen.

By an abator, &c.

If, therefore, an *abator*, *disseisor*, or *intrudor* make the assignment, as the lawful tenant ought to have done, it will be good and binding upon such tenant (*a*).

Except such freehold was acquired in collusion with the widow. Then assignment voidable.

But if the tortious freehold of the assignor had been obtained by the means or in collusion with the widow, in order to her being endowed by the abator, &c., although the assignment would not be void under such circumstances, yet it would be voidable by the entry of the heir (*b*); for according to *Lord Coke*, "The covin or fraud suffocated the widow's right, and the wrongful manner by which the freehold was acquired, avoided the matter that was lawful;" *i. e.* rendered voidable the endowment, which was made by a person competent to make it. The effect would have been the same, if, under those circumstances, the assignment of dower had been fairly made, of one equal third part to the widow, by the sheriff, after she had obtained a judgment for her dower (*c*).

And not remedied even by a fair endowment by the sheriff.

The law, however, only countenances the acts of persons acquiring estates by wrong, from necessity; and in the present instance for the benefit of the widow, whose endowment might otherwise be totally prevented. This inconvenience being guarded against by the means above mentioned, the law then interferes to protect the right of the lawful heir; and lest he might be injured by the transaction, it supports only such assignments of dower by abators, &c., as the heir, if he had

---

(*a*) Perk. sect. 394. Co. Litt 35. (*b*) Perk. sect. 395.
(*c*) Co. Litt. 35.

been in possession of the lands, was bound to make; *i. e.* of a third part of them. So that if an abator, &c., assign to the widow a rent out of the lands, instead of assigning a third part of them according to the common law, the assignment will be void, the widow not being intitled to such an endowment; and consequently the abator, &c., was not obliged or authorised by law to make such an assignment as, or in satisfaction of, dower (*a*).

Assignments by an abator, &c. in order to bind the heir, must be made according to law. So that assignment of a *rent*, instead of *land*, will be void.

Upon similar principles, if two persons be *joint tenants* of an estate under a devise or conveyance from a man whose widow is intitled to dower out of it, and *one* joint tenant assigns a third part to her for dower, the assignment will be good and obligatory upon his companion; because he being tenant of the freehold, *per mis et per tout*, was competent and compellable to make the assignment, which was made according to the rule of the common law.

One joint tenant may assign dower, which will bind the other.

Unless the assignment be not according to the rule of the common law.

But if the joint tenant had assigned to the widow a rent out of the estate for dower, then his companion would not be bound by the assignment, for the same reasons which have been before mentioned, in relation to similar assignments by persons seised of tortious freeholds (*b*).

So also, a husband seised of lands jointly with, or in right of his wife, may assign dower to a woman intitled to it, out of the estate, and his widow will not be permitted to defeat the assignment after his death (*c*); but it is presumed, upon the reasons before given, that the assignment must be such as the law authorises to be made; viz. of a third of the lands, or the husband's widow may avoid it.

So may husband seised jointly with, or in right of his wife. Provided the assignment be according to law.

3. Having considered when, and by whom dower is

How dower is to be assigned.

(*a*) Perk. sect. 397—398. Co. Litt. 35. 6 Rep. 57 *b*.
(*b*) Perk. sect. 397. (*c*) 1 Roll. Abr. 681. Perk. sect. 399.

to be assigned, I shall in the next place proceed to consider *how* the assignments ought to be made.

Dower assignable by parol.

[Dower may be assigned by parol. The widow being entitled of common right, nothing is required but to ascertain her share; and when that is accomplished by the assignment, and she has entered, the freehold vests in her, without livery of seisin or writing (*a*). And this is true, not only when the dower is assigned in the manner prescribed by law, but also where a different mode of assignment is adopted by agreement, as where a rent issuing out of the lands (*b*), or an undivided third part (*c*) is allotted to the widow.]

Assignment at common law.

The assignment of dower required by the common law, is of one third part of the lands or tenements of which the widow was dowable, and to be set out by *metes* and *bounds* where it is practicable, to be held by her for life. Hence it appears, that the endowment must be *parcel* of the lands and tenements themselves.

A contrary assignment without widow's consent not good.

If, then, the heir or tenant assign to the widow, without her consent, a *rent* issuing out of such lands or tenements for her dower, the assignment will be invalid, and therefore not obligatory upon her (*d*). But if the assignment be by *indenture*, to which she is a party, the indenture operating as an *estoppel*, she will be precluded from questioning the assignment, and excluded from any other endowment (*e*).

If the assignment be by indenture, then she is *estopped*, and cannot question it.

Assignment by tenant or sheriff ought to be by metes and bounds of a third part.

Such is the widow's common law right of endowment, and the sheriff or tenant ought so to assign it. If, then, the widow be intitled to dower out of manors and lands, the sheriff or ter-tenant must assign to her

---

(*a*) Co. Litt. 35 *a*. Rowe v. Power, 2 N. R. 1. 34. (*b*) Co. Litt. 34 *a*. Jenk. p. 9. Perk. 406. 9 Vin. Ab. 263. pl. 2. (*c*) Coots v. Lambert. Co. Litt. 32 *b*. *n*. 1. Sty. 276. 1 Ro. Ab. 682. 2 N. R. 34. (*d*) Perk. sect. 406. Co. Litt. 34 *b*. (*e*) Dyer, 91, *b*. *pl*. 12. Or if the assignment of the rent be without deed, but is accepted by her, it will be equally binding, *vide supra*.

one third part of each, by metes and bounds (*a*). The reason is, that it is more eligible and convenient for the widow and tenant of the lands to enjoy their shares in severalty, than in common. But if the writ directed to the sheriff command him to deliver possession of a third part of all lands and tenements, &c., and there were lands in meadow, pasture, and corn, he would act in obedience to the writ by assigning dower *in toto*, out of any of these descriptions of lands, and his return to the Court of having done so would be good (*b*).

How assignment to be made when husband died seised of three manors.

It is said (*c*) that if the widow be dowable of three manors, the sheriff may assign one manor to her in lieu of dower out of all; but this is denied by the Court in an *anonymous* case in *Moore* (*d*), because the widow is intitled, by common right, to dower of a third of each manor. The difference probably may be thus reconciled; if the widow *recover* dower out of three manors, and the writ to the sheriff direct him to assign it *out* of the three, then his assignment of one manor for dower out of all will not be good (*e*); but that if the direction in the writ be general, to assign dower of all lands and tenements comprised in it, and the parties *agree*

(*a*) Litt. sect. 36. (*b*) Moore, 19, pl. 66. (*c*) Moore, 19. (*d*) Page 12, pl. 47. (*e*) But perhaps the authorities in favour of this mode of assigning dower would now prevail, if the manor assigned were equal in value to one-third of the whole. It does not seem to be necessary in all cases, that the widow should have a third of each part of the husband's estates. Thus if the husband be possessed of several different mines, it is not necessary that the sheriff should divide each of them; but he may assign such a number of them as may amount to one-third in value of the whole. 1 Taunt. 411. See also 9 Vin. Ab. 257, pl. 13, 14. ibid. 260, pl. 3. And if one of the husband's estates had been aliened with warranty, in many cases the whole of the wife's dower was assigned out of the remaining estates, if sufficient. See post. Sect. 5. In Br. Dower, 72. Littleton reasons on the supposition that the assignment is to be made in the same way as under a writ of partition or an elegit, where a division according to the value is sufficient. Clarendon v. Hornsby, 1 P. W. 446. Den v. Abingdon. Dougl. 456. See Br. Elegit. 14.

that one manor shall be assigned for dower in respect of all the three, such assignment will be good (*a*).

Of the sheriff's return.

The sheriff is a mere ministerial officer, and can only assign dower according to the rule of the common law, and the tenor of the writ addressed to him by the Court (*b*).

Ought to state livery of seisin by metes and bounds.

If, therefore, the subject out of which dower is to be assigned, be divisible into shares, and he does not return that he has delivered seisin of a third part of it by *metes* and *bounds*, the assignment cannot be supported. Yet it is not necessary for him to state, in his return to the Court, the particular fields which he has allotted for the widow's third; it will be sufficient if he mention with certainty and precision of what such third consists.

Return of seisin of one third of a "tenement or farm, then or late in the occupation of *A*."

Thus, in *Howard* v. *Cavendish* (*c*), the sheriff returned, that he had delivered seisin to the widow "of one third part of the honor, hundred, tenement, and advowson; viz. of one tenement or farm in *C*, called *W*, then or late in the occupation of *A*, &c.:" concluding, as it is to be inferred, that the delivery was made by metes and bounds of such of the particulars as were capable of it. It was objected that the return was void, since the expressions "tenement or farm" were uncertain, and that an ejectment for a messuage or tenement (*d*), or an indictment stating an entry into a tenement or farm, was insufficient, for uncertainty. But the Court decided otherwise; observing, that the same particularity was not required in returns of assignments of dower, as in declarations or indictments; and that "messuage or tenement, in the tenure of *J. S.*," was an usual and a good return; more especially, as in the present case the sheriff had stated, in

---

(*a*) 1 Roll. Abr. 683, pl. 30. Moore, 19, pl. 66. (*b*) 1 Roll. Abr. 683, pl. 35. (*c*) Cro. Jac. 621, pl. 18. Palm. 264. (*d*) *Contra*, 1 Burr. 623, and 1 Term. Rep. 11.

the conclusion of his return, that he had made a delivery by metes and bounds (*a*).

Instances of the sheriff's misconduct punished.

But if, in assigning dower, the sheriff discharge his duty vexatiously and maliciously, he will be punished by the Court, and the assignment set aside. An instance of this occurred in *Howard* v. *Cavendish* (*b*). The sheriff returned that he had assigned dower to the widow of a house; viz. a third part of each chamber, and that he had chalked out each part for her. It was determined that this was an idle and malicious assignment, and the sheriff was committed to prison.

The Court proceeded in the same manner in a case (*c*) where the sheriff refused to make an equal allotment for dower, in obedience to directions from the Court, and had been besides extortionate in his demands, taking from the widow 60*l*. to execute the writ of execution.

When assignments by metes and bounds excused.

When the property does not admit of an assignment of dower in severalty, either from the nature of the husband's interest in it, or from the quality of the thing itself, an assignment by metes and bounds will of necessity be dispensed with.

An instance where the nature of the husband's estate precludes an assignment of dower by metes and bounds, occurs in the case of a tenancy in common.

As in instances of tenants in common and coparceners.

Thus, if the husband be tenant in common in fee with *B*, and die before a partition, his widow's dower must be assigned to her to hold in common also, and not in severalty. The reason is, that her husband was seised at his death of his moiety, in common with *B*; his widow, therefore, succeeding to a third of his interest for her life, cannot enjoy it otherwise than he did; so that she must of necessity hold it in common

---

(*a*) See Den v. Abingdon. Dougl. 456. Fenny v. Durrant. 1 Barn. & Ald. 40. (*b*) Palm. 264. (*c*) Longville's case, 1 Keb. 743.

with her husband's heir, and with *B*, the surviving tenant in common (*a*).

Upon the same principle, the like law prevails in the case of coparceners. But the determinations would have been different in each case, if partition had been made before the husband's death; for then he would have died solely seised of his moiety, and his widow's dower would be capable of being assigned in severalty; the assignment of it, therefore, ought to be made by metes and bounds (*b*).

Assignments by metes and bounds also excused when dower is of Houses,

Instances of the second class of cases, when assignments of dower by metes and bounds are excused from regard to the natures of the property in which the widow is dowable, are as follow:

When the thing is *entire*, as a house, dower ought to be assigned of so many rooms, and not of a third part of it (*c*).

Mills,

Of a mill the widow cannot be endowed of a third, although she has a freehold interest in it. The proper assignment of dower in this case, is either of the third toll-dish, or of a third of the profits; and the widow may grind there toll free (*d*). And if she recovered judgment in a writ of dower of a third part of the mill, it would be erroneous, and might be reversed on a writ of error (*e*).

Piscaries, &c.

Of stallage, a fair, an office, the keeping of a park, a piscary, and of courts, fines, heriots, &c., the proper assignments are of one third of the profits of each (*f*).

As to mines and minerals.

Of open mines and minerals, the following distinctions have been laid down in regard to the manner of assigning dower.

If the open mines be within lands which belonged to

(*a*) Fitz. N. B. 149. (I.) 1 Brownl. 127. (*b*) Perk. sect. 412. (*c*) Palm. 264. (*d*) Perk. sect. 415. Co. Litt. 32. Gilb. "Dower," 397. (*e*) Gilpin v. Cookson, 1 Lev. 182. (*f*) Co. Litt. 32.

the husband, the sheriff must estimate the annual value of them, as part of the value of the lands of which the widow is dowable; but he need not assign to her any of the mines, or any parts of them: he may include a third of their annual value in the quantity of the lands set out by him by metes and bounds for dower, in which are none of the mines or minerals. But if he choose, as he is at liberty to do, to include any of the mines or minerals in the assignment, then if the lands in which they are, form no parts of the lands assigned for dower, he ought to describe the mines specifically: if, however, the mines assigned be included in the lands set out in dower, it is optional in him to particularise them, since they are parts of the lands assigned. But the sheriff may not adopt any of these methods; he may divide the enjoyment and perception of the profits of the mines between the parties; viz. by directing the separate alternate enjoyment of the whole for short periods, proportioned to the share each party had in the subject, or by giving to the widow an adequate part of the profits.

With respect to open mines or minerals of the husband, lying in the lands of other persons, and in which his widow is intitled to dower, it is to be observed, that if the assignments for dower of such mines could be made by metes and bounds, in the manner lands are required to be divided, that method ought to be adopted; but since that cannot be accomplished without preventing the parties from having the proper enjoyment and perception of the profits, this species of property is analogous in principle to those before noticed, in which the sheriff is permitted to assign dower in a special manner. It is not, therefore, necessary that the sheriff should divide each of those mines; but he may assign such a number of them as amount to one third in value of the whole, or he may proportion the enjoyment of such of them as he thinks proper, so as to give

each person a due share of the whole, as before mentioned (*a*).

Advowsons in gross and appendant.

The common law mode of assigning dower of an advowson, is the third presentation (*b*). And if there be advowsons *appendant* to two or more manors in which a widow is dowable, the assignment should be of a third part of each manor, and of the third presentation to each church (*c*).

Franchises appendant, &c.

With respect to franchises appendant to an Honor, an assignment of a third part of them with a third of the Honor, was held good (*d*); and there appears to be no objection why a similar assignment of them should not be made when they are appendant to a manor, although *Brooke* (*e*) states the law to the contrary, for a reason, which, if good, equally tends to avoid the assignment in the other case; viz. because the franchises cannot be divided.

Tithes, how to be assigned for dower.

In regard to tithes, in which the widow is also intitled to dower, the methods of assignment are next to be considered.

It is agreed, that in a writ of dower for tithes, the demand must be made with certainty, so that such a judgment may be given as to enable the sheriff to execute a writ of execution founded upon it (*f*). The several kinds and natures of the tithes ought at the least to be clearly expressed; and it was holden in *Harpur's* case, that an ejectment for all tithes in *A*, without saying more, was not good; but it would be otherwise if the natures and kinds of them had been generally stated, as *de quâdam portione granorum fœni, lani, agnellorum*, &c. (*g*). The assignments to be made by the

---

(*a*) Stoughton v. Leigh, 1 Taunt. Rep. 402. (*b*) 1 Roll. Abr. 683. (*c*) Co. Litt. 32 *b*, note 2. (*d*) Cro. Jac. 622. (*e*) Dower, fo. 256, pl. 102. (*f*) Thyn v. Thyn, Sty. 77. (*g*) 11 Rep. 25 *b*. 1 Roll. Rep. 68.

sheriff upon such recovery, or by the ter-tenant without suit, appear to be as follow:

Of corn and grain, the third sheaf, or tithes of the third yard-lande (*a*). And upon the same principle, — Of corn and grain.

Of hay, &c., the third tithe cock, or a third of the tithe as rendered. — Hay.

Of lambs, the third tithe lamb, and — Lambs.

Of wool, &c. the third of the tenth part (*b*). — Wool.

Another exception to the general rule of assigning to the widow a third part of the estate by metes and bounds occurs when she consents to accept her dower in a different manner; for it is settled that the right to have the assignment by metes and bounds may be waived by the widow, and that in such cases an assignment to hold her dower in common and not in severalty, will be binding upon her. — Assignment against common right good at law by the widow's consent and entry.

It is a consequence from what has been said, that if a widow be dowable of several manors, lands, tenements, commons, &c. she may accept an assignment for life of any one or more of them in lieu of her dower in all the rest; and such assignment confirmed by entry will bind her, although it may be less than the value of her third part of each (*c*).

Accordingly in a case (*d*) where eighty-four acres of land were assigned to the widow for dower by the sheriff out of lands mentioned in the writ addressed to him, upon a *scire facias* brought by the widow, suggesting that sixty of the eighty-four acres belonged to a stranger, and were not mentioned in the record, and that in consequence there ought to be a new division, the tenant in his defence said, that the difference, viz. twenty-four acres, were parcel of the lands recovered by the widow — Instances, of lands.

(*a*) Co. Litt. 32, and note 3 there. See 9 Vin. Ab. 257. pl. 12. Countess of Oxford's case. 11 Rep. 25 *b*. (*b*) 1 Brownl. 126. (*c*) 1 Roll. Abr. 683. Perk. sect. 405. 2 New Rep. 33. (*d*) Moor, 679, pl. 928.

in the suit, and had previously been entered upon by her in lieu and satisfaction of her dower. The judgment was, that she was bound by her acceptance and entry upon the twenty-four acres, although they were less in quantity than a third of the whole mentioned in the record.

Hence it seems, that mere consent to accept dower contrary to common right will not be sufficient to bind the widow; which also appears from the form of the plea, that ought to contain the words *quod intrando agreeavit* (*a*), or words in English of the same import.

Of rents.

Again,

Where the tenant assigned to the widow twenty bushels of wheat every year for her life out of the lands in which she was intitled to dower; that, being in the nature of a rent, and accepted by her, was holden to be a good assignment (*b*).

So also in a case where a rent was granted by tenant in tail out of the estate to a widow, who was intitled to dower out of the lands, in lieu of such dower. She accepted the rent; and it was determined to be a good assignment to the extent at least of excluding her right to endowment whilst the rent continued, and was not determined by the issue in tail (*c*). And in pleading such an assignment the tenant should use the technical word *assignavit* (*d*).

In the plea the word *assignavit* necessary.

Instances where assignments against common right will be good with the widow's consent after judgment in writ of dower.

And if a widow recover judgment for her dower out of *certain* lands, and before execution she accepts from the tenant an assignment of a rent out of them in lieu of dower, this assignment will be a good answer by the tenant to a *scire facias* brought by her to obtain execution upon the judgment, because the assignment is a compliance with and satisfaction of the judgment (*e*).

(*a*) 3 Leon. 272. (*b*) Moor, 59, pl. 167. Dyer, 91, in marg. (*c*) Bickley v. Bickley, And. 287. (*d*) See Wentworth's case, Cro. Eliz. 452. (*e*) *Supra*, p. 397, and see Hanger v. Fry, Cro. Eliz. 310.

But the reverse would have been the case if the rent had been assigned out of lands in which the widow was *not* intitled to endowment, and therefore not the subject of the suit nor mentioned in the record, for then the assignment would not agree with the directions of the judgment, which only respected the lands of which the widow was dowable. This assignment, therefore, could not be a satisfaction of the judgment, and consequently no impediment to the widow's obtaining execution under her *scire facias* (*a*). Besides, such an assignment is not, as it will afterwards appear, a good legal assignment in lieu or satisfaction of dower.

Instances when assignments with consent against common right will be void at law.

It is observable, that it was the widow's consent entry and acceptance which, in the above instances, gave validity to the particular assignments of dower against common right. But her consent will not avail to establish them when from the nature of the transaction she cannot have the like estate or interest in the subject assigned in lieu of dower, as she would have had, if her dower had been assigned in the regular way, viz. during her life. It may, therefore, be considered as settled at law, that an assignment with the consent and acceptance of the widow of something in lieu of dower to which she is intitled of common right, must either be of some part of the lands of which she is dowable, or of a rent issuing out of them, and for such an interest as may endure for her life; and that if any of these particulars be wanting the assignment will be void (*b*).

As where the assignment is of lands not subject to dower.

Thus, if lands of which the widow is *not* dowable be assigned *without deed* to her for life, as or in lieu of dower of lands to which that right attached, the assignment will be invalid, although she accepted it, because she could not enjoy the lands assigned during her life; for she having no interest in the lands given in lieu of dower, could only hold them as tenant at *will* for want

(*a*) Perk. sect. 410. (*b*) Co. Litt. 34 *b*.

of livery of seisin to pass a freehold, *i. e.* to intitle her to them for her life; the law, therefore, will not permit such an interest to be a satisfaction of her title to dower (*a*). But when an assignment is made to her of lands in which she is dowable, in lieu of dower, she acquires an estate of freehold in her third part by the assignment without livery of seisin, although the assignment be against common right. It is, however, presumed, that if the assignment in the above case had been made by deed under the statute of uses, it would have been good, since the widow would have had a freehold in the lands for her life, and which lands she would have held as tenant in dower (*b*).

So also a rent assigned, without a deed, in lieu of dower out of lands in which the widow is *not* dowable,

---

(*a*) Vernon's case, 4 Rep. 1. Perk. sect. 407. 410. (*b*) See Co. Litt. 34 *b*. n. 9, where it is said, that if the heir assigns dower of lands of which the husband was seised, but the wife not dowable; she is tenant in dower. However, in the first resolution in Vernon's case, *ub. sup.* it was expressly decided, that if after the death of the husband the heir makes an estate to the wife for life of any land (whereof she is not dowable) in full satisfaction of her dower, that is no bar of dower. This was on the supposition that the estate given in lieu of dower was effectually conveyed to her, and it proceeded on the principle that a right to an estate of freehold could not be barred by acceptance of any collateral recompense. See to the same effect Co. Litt. 34 *b*. Turney v. Sturges, Dyer, 91 *a*. And it was on the same principle that a jointure was at common law no bar of dower, but the widow might accept the jointure, and also claim dower out of the other lands of her husband, 4 Co. 2. *Post*, chap. 10. sec. 1. It seems, therefore, that a grant of other lands, or of a rent out of other lands, or of any other collateral satisfaction, made by the heir to the widow in lieu of dower, and accepted by her, cannot be pleaded at law in bar to a writ of dower. But if such grant be accompanied by a release of her dower, or a confirmation, or any thing tantamount to it, it will be a bar to her claim. 4 Co. 1: and thus it was said, in the same case, that acceptance of dower by deed indented would conclude her. As to the effect of a collateral satisfaction for dower in equity, see *post*, chap. 19. sec. 3. chap. 11. sec. 3.

is under the same circumstances as the last case. The assignment, therefore, cannot be supported at law although it be accepted by her, because the law does not allow a rent which lies in grant to pass otherwise than by deed; so that such an assignment as above of a rent in lieu of dower out of lands not subject to that right, passes no interest in it to the widow; and on the other hand, since dower is a title created by law out of particular estates and interests, it allows the widow to accept a rent out of the same estates by mere assignment *without* deed; yet in that case unless the rent assigned be commensurate with the widow's life, her acceptance of the assignment of it will not at law make it good. Thus, if the rent be granted for *years* only, or *pur autre vie*, the assignment will be void (*a*).

But the law requires the assignment to be made for the widow's life.

In the last class of cases it is apparent that the widow could not enjoy what she agreed to take in lieu of her dower of common right for want of a proper title; the Courts of Law, therefore, considered the assignments of them in the same view as if none had been made. But when this objection did not occur, and the widow accepted and entered upon the subjects assigned to her in lieu of dower, those Courts, upon the principle of election, more extensively acted upon by Courts of Equity, held the widow concluded by her acceptance and entry, and to be barred from claiming her dower of common right (*b*).

In addition to the assignment being made for the widow's life, it must be *unconditional.*

It has been noticed that the assignment of dower must be made for the widow's life, a term necessary to

---

(*a*) And. 288. Hob. 153. Co. Litt. 34 *b*. (*b*) See 3 Leon. 272. The passage referred to related to the effect of a compensation for dower in barring the wife's claim, as a jointure under the stat. 27 Hen. 8. See *post*, chap. 10. Some other cases in Courts of law; which may appear to have proceeded upon the principle of election, will be found to have turned upon that statute, or upon the doctrine of estoppel. See Harford v. Dillon, 2 Brod. & Bing. 12. 1 Swan. 429, note, and *ante*, p. 402, note *b*.

be observed, whether the assignment be of common right, or of a compensation in lieu of dower. To this requisite must be added, that the assignment be absolute, unconditional, and without any exception or reservation in diminution of its value (*a*). The reason mentioned in the books is, that the widow's third part is a continuation of her husband's estate and interest; and that the heir or ter-tenant is but a minister of the law to assign and mark out such her share (*b*); but perhaps the more eligible reason may be, that since the law gives to the widow a third part of the estate for her life, free from any charge, condition, or restraint imposed by her husband, the persons claiming under him can have no larger power, and consequently cannot fetter or diminish her proportion by any terms, conditions, exceptions, or reservations annexed to or made out of the assignment. It would seem, therefore, that such conditions, &c. are void without vitiating the assignment, because the person assigning dower was enabled to do so, but when he exceeded his power by annexing a condition, &c. such condition, &c. only were void.

The conditions, &c. are void, but the assignment good.

In *Wentworth's* case (*c*) the tenant pleaded that he granted by indenture to the demandant (the widow), a rent out of the land in recompense of her dower, which she accepted. The widow admitted the facts, but averred that there was a condition in the deed, that if the rent was not paid within a certain time after it became due the rent *should cease*, and the *indenture be void*; and she showed a breach of the condition. To this the tenant demurred, and judgment was finally given in favour of the widow, for this principal reason,

---

(*a*) Co. Litt. 34 *b*. (*b*) And because when her share is set out, she comes in by her husband, and her title has relation to his death. 9 Vin. Ab. 257. pl. 7, 8, 9. (*c*) Cro. Eliz. 451. S. C. Noy, 55. 2 And. 30.

viz. the annexed condition, the Court observing, that rent assigned in recompense of dower, which is in lieu of the dowable estate, ought to be as absolute as the assignment of the land itself, wherefore the condition annexed was void.

It is to be remarked in the last case that the condition and the thing assigned were incapable of separation, so that a breach of the condition defeated the assignment (*a*). Again,

In the case of *Bullock* v. *Finch* (*b*), it was adjudged that if dower were assigned of the land with the *exception* of the trees growing upon it, the exception would be void.

Such is the rule of law upon these subjects; but Courts of Equity, acting upon the doctrine of election, which has been adverted to, would consider the widow excluded from her dower in those instances, if she accepted the compensation in lieu of it, or the assignment made with conditions, &c.

Not so in equity, if the widow elect to take the compensation in lieu of dower.

Thus in the case of *Birmingham* v. *Kirwan* (*c*), the husband devised his house and demesne lands in trust for his wife during her life, she paying a yearly rent of thirteen shillings out of each acre of the lands, and keeping the house, &c. in perfect repair; and she was not to demise the premises except to the persons in remainder. *Lord Redesdale* ordered the widow to elect between the devise to her, and her dower of the premises.

In the last case the estate limited to the widow was

(*a*) The consequence of the condition being held void would have been, that the widow would have been entitled to the rent for her life, and her right to dower would have been barred. But it appears by Croke's Report, that the case was decided for her on the ground that the heir had not pleaded the grant of the rent as an assignment of dower but as a mere grant, using the words *dedit et concessit*, without the word *assignavit*. (*b*) 1 Roll. Abr. 682, pl. 45.
(*c*) 2 Scho. and Lefroy, 444.

for her *life*; but a term for years, or any other compensation settled upon or given to her in lieu of dower, will be attended with the same consequence, if she elect to accept them in satisfaction of her legal claim (*a*).

Remedies against excessive assignments by *sheriff*.

At law, and in equity.

It may happen that the sheriff, heir, or tenant may have assigned more to the widow than a third part of the subject in which she was intitled to dower; the remedies in such cases vary according to the persons by whom it was assigned. If it be assigned by the sheriff, his mistake in assigning more than one-third for dower will be corrected upon a *scire facias* for an assignment *de novo* by the heir or tenant (*b*). And if the assignment be of lands not comprised in the judgment, they may be recovered back in an ejectment; for whatever is included in the sheriff's return, and not authorised by the judgment, to that extent the execution is void (*c*). But the heir or tenant may apply to a Court of Equity, which will entertain jurisdiction, and relieve them against a partial or improper return by the sheriff (*d*).

Accordingly, in *Hoby* v. *Hoby* (*e*), a suit was instituted to be relieved against a fraudulent assignment of dower (as it was charged) by the sheriff, who had assigned to a widow for dower a full third part of lands, in which there was a coal-mine of considerable annual value, but in respect of which no consideration was had in the assignment. The Court proposed terms for the

---

(*a*) 9 Mod. 152. See further on this subject, chap. xi. sect. 3. (*b*) Palm. 266. Bro. "Dower," fo. 255 *b*, pl. 83, and see *ante*, p. 395. (*c*) 2 Ld. Raym. 1293—5. (*d*) As dower is now rarely sued for at law, cases of this kind are not likely to occur, but it is doubtful whether Courts of Equity would at present entertain this jurisdiction, if it appeared that the party aggrieved might have adequate redress in the Court of Law, under whose authority the sheriff acted. In Stratford v. Twynam, Feb. 16, 1822, the Master of the Rolls was of opinion that there was no jurisdiction in Equity to set aside a sale by a sheriff under an execution, but that the proper course was to apply to the Court of Law from which the process issued. (*e*) 1 Vern. 218. 2 Ch. Ca. 160.

consideration and acceptance of the widow, and directed, that if they were not accepted, a new assignment of dower should be made.

So also in *Sneyd* v. *Sneyd* (*a*), the defendant had recovered judgment in a writ of dower, and dower was assigned by the sheriff; but he having taken into his estimation as part of the property of which the widow was supposed to be dowable, lands in which she was not intitled to dower, by which means the share of the estates assigned to her in dower exceeded one-third of those of which she was dowable, the heir filed a bill to be relieved against such assignment; and the Court ordered it to be set aside.

No remedy at law for an heir of full age who makes an excessive assignment of dower.

When the assignment of dower is made not by the sheriff but by the heir, then if he be of full age, and were under no disability when he made the assignment, although the assignment exceeded the widow's one-third part of the value of the estate, a Court of Law would not relieve him against it (*b*).

Accordingly, in a case (*c*) sent by the Court of Chancery to the Court of Common Pleas, it appeared that the heir being of full age, let his ancestor's widow into possession of, and assigned to her for dower of an estate called (A), certain closes of land, in which there was an open coal-mine wrought at times during the marriage, but which had been discontinued long before the husband's death. The value of the closes was amply sufficient to answer any demand of dower, without regard to the value of any of the coal. The question was, whether the heir had any and what relief in respect to the excess of his own assignment? And the Court certified, that since the assignment was the act of the heir himself, he being of full age at the time, they thought that he had no remedy at law against the dowress for avoiding the consequences of that act.

(*a*) 1 Atk. 442. (*b*) Gilb. "Dower," 380. (*c*) Stoughton v. Leigh, 1 Taunt. 401, 412.

Contra if the heir be under age.

But if the heir were under age when he assigned dower, the law protects him against the consequences of an excessive assignment, and supplies him with the writ of *admeasurement* of dower. This writ is viscontiel, and addressed to the sheriff, directing him to make the admeasurement finally. It is not made returnable (*a*), and the parties may plead before him if they think proper. The plaintiff, however, may, without showing any cause, and the defendant may, upon showing cause, remove the writ into the Court of Common Pleas, as in a replevin; and then process will issue out of that Court, viz. a summons, attachment, distringas, &c. In such cases the sheriff cannot make admeasurement, but he ought to extend all the lands particularly, and make a return to the Court of Common Pleas, upon which the Judges will make the admeasurement (*b*).

Writ of admeasurement.

And it seems that the heir may have the writ before his age of 21.

The books differ in regard to the time when the heir is intitled to issue the writ. Some of them stating, that he cannot have it before he attains the age of twenty-one years (*c*), while others mention that he is intitled to it during his minority (*d*); but reason and principle seem to be in favour of the law as laid down by *Fitzherbert* in his book last referred to in the notes, that the heir is intitled to the writ during his nonage.

But he cannot defeat the assignment by entry.

But an infant heir who has assigned too large a portion of lands for dower, cannot defeat the assignment by *entry* upon attaining twenty-one, because the widow being intitled to dower, the assignment is good in part, and can only be avoided *quoad* the excess, which is uncertain previous to admeasurement (*e*).

(*a*) Cases must be excepted where the lands lie in different counties, for then there must be several writs for each county, and inquests held in each, and the writs are made returnable before the Judges, who after comparing the various returns, adjudge the quantity of land to be returned to the heir. See Gilb. "Dower," 382.
(*b*) Fitz. N. B. 148, G. H. See also Gilb. "Dower," 385.
(*c*) Co. Litt. 39. 2 Inst. 367. (*d*) Fitz. N. B. 149, B.
(*e*) Gilb. "Dower," 388.

So also, if the assignment had been made under the judgment of a Court of law, a writ of admeasurement would not lie for the heir at his age of twenty-one, since it is presumed, from his being an infant when the assignment was made, the Court took care of his interest (*a*). It would however seem, that if the sheriff, in carrying into effect the writ of execution, did actually assign more than a third part of the lands for dower, when the widow was intitled to a third only, the heir might bring a *scire facias*, or he would be without a remedy (*b*).

Writ of admeasurement does not lie upon an excessive assignment by the sheriff. *Semble*, that heir may have a *sci. fa* on attaining twenty-one.

If the lands assigned by the infant heir exceed one-third of the whole, and they become more valuable than the remainder, by improvements made by the widow, it is said that a writ of admeasurement will not lie on account of such improvements (*c*), as that would be unjust, since she may have been induced to make them under a presumption that the assignment was proper. But there seems to be no objection to the admeasurement of the lands assigned, and to the heir taking the overplus, upon allowing for the value of the improvements of the excess of lands assigned. Thus, if the assignment were of four acres when the number should have been three, the heir might take back the fourth upon the admeasurement, and make compensation to the widow for the value of its improvements.

As to writ of admeasurement after improvements made by widow posterior to assignment.

It is also said to be doubtful whether, if an open mine of coals or lead were in the share assigned by the infant heir, so as render the widow's third of greater

And when by reason of open mines included in the assignment by infant heir the assignment is excessive.

(*a*) But a writ of admeasurement lay upon an assignment of dower by the King in Chancery. F. N. B. 149 *a*. Co. Litt. 39 *a*. This mode of assignment took place where the heir was in ward to the King, or where the King held the lands for his primier seisin: on the petition of the widow to the King in Chancery, a writ *de dote assignanda* issued to the escheator. Bacon Ab. Dower, D. 3. Bedingfield's case, 9 Co. 16. F. N. B. 263. 7 Mod. 43. (*b*) Gilb. "Dower," 389. (*c*) Fitz. N. B. 149, C.

value than the remaining two-thirds, a writ of admeasurement would lie (*a*). It is presumed, however, attending to what has been observed on the assignment of mines and minerals, in a preceding page (*b*), and the necessity of estimating the yearly value of them as part of the value of the whole estate, that if no estimate of the mine in question had been made, there could be no objection to the heir's title to the writ of admeasurement to rectify the mistake, and to reduce the widow's assignment.

Assignments of dower *de novo*.

The cases which have been considered upon admeasurement of dower, are such as respected the heir when the widow had more than her third part assigned. It may, however, happen that the widow may be deprived of the whole of her dower by a title prior to that of her husband. In such cases she is intitled to an assignment *de novo*. Between this assignment and an admeasurement there is this difference in the procedure. In admeasurement there can be no new assignment of dower (*c*); whereas in instances of the widow's eviction by a prior title, it is necessary there should be one. An assignment *de novo*, therefore, happens when the lands, &c. assigned to the widow in dower are recovered from her by an elder title (*d*). To exemplify this.

If the husband be lawfully seised of two acres, and of a third by disseisin before his marriage, and dies, and his widow be endowed of the acre which he held by disseisin, and then the disseisee recovers from her that acre, she will be intitled to be endowed *de novo* of the third parts of the two remaining acres, and cannot claim any compensation for that acre which she lost, because by the recovery of the disseisee, her husband's seisin was defeated *ab initio*, and it is, in respect

---

(*a*) Fitz. N. B. 149, C. (*b*) *Supra*, p. 396. (*c*) Fitz. Nat. Brev. 148. F. (*d*) 9 Vin. Ab. 264.

of such acre, as if her husband had never been seised of it (*a*).

Dower assignable in Chancery.

I must observe in conclusion, that dower is assigned in the Court of Chancery; a forum more generally resorted to than a Court of law, as the more eligible of the two, since the forms and perplexities of the latter tribunal are thereby avoided (*b*).

4. The next subject proposed to be considered, was the effect of an assignment of dower.

After assignment of dower, the wife's title defeats incumbrances and debts made and contracted during the marriage.

A distinction prevails upon this subject when the assignment is made according to the common law, and when it is made with the consent of the parties contrary to the forms of that law; both of which methods have been before considered.

When, therefore, dower is assigned as the common law requires, the widow's title will have such a relation to her husband's first and original seisin of the estate, and the period of the marriage, as to defeat not only all charges and incumbrances which he alone made during the coverture after acquiring the estate (*c*), but also all debts which he contracted during the marriage, in respect of which such property might be affected, without regard to the circumstance, whether the debts were owing to a private individual or to the crown (*d*). And the form of the writ for discharging the widow's dower, owing by her husband to the king, will be found in the two books last referred to.

Suppose that the husband being seised in fee of three manors, grant a rent charge out of them. If one-third

---

(*a*) 1 Roll. Abr. 684, pl. 25. Perk. sect. 418, 419, 420. Fitz. N. B. 149, M. 4 Rep. 122, and Gilb. "Dower," 424. (*b*) Mundy v. Mundy, 4 Bro. C. C. 294, *post*, sect. 5. (*c*) Fullwood's case, 4 Rep. 64 *b*. Jenk. 36, pl. 69. Co. Litt. 33. (*d*) Co. Litt. 31. Fitz. N. B. 150, Q. Gilb. "Dower," 407—411. So also the widow holds discharged from leases made by her husband during the coverture (Noy, 65. 1 Taunt, 410.) and she is not bound by his release of a rent. Co. Litt. 32 *a*. 6 Co. 79.

of each manor be assigned by the heir to the widow for dower, according to the common law, she will enjoy these thirds discharged from the rent, for the reason before mentioned.

Contra if the assignment were by consent and different from the common law rule.

But the reverse would be the case if she accept an assignment contrary to common right (*a*). Thus, if, in the above case, she had accepted an assignment of one of the three manors in lieu of dower in all of them, she would hold that manor subject to one-third of the rent charge, or, according to *Perkins*, two-thirds of the manor would remain liable to the distress of the grantee (*b*); because the law carries back the title of the widow to the husband's first seisin, in instances only where dower is accepted and assigned according to its own form and rule; but when a different form and rule are adopted by the consent of the widow, she claims in the nature of a purchaser, so that her estate commences from the assignment, and without relation to any antecedent period; for which reason she takes it with all the incumbrances affecting it in the possession of her husband, and it was her own folly to accept of such an assignment (*c*).

In addition to the above observations it may be remarked, that the law does not allow to private agreements between individuals, such an effect as to prejudice the interests of a stranger, as is the grantee of the rent charge in the case last mentioned; so that his remedy extending over all the manors, prior to the assignment of dower, against common right, cannot be abridged to the remaining two manors by the agreement between the heir and widow that she should be endowed in a manner not prescribed by law, which is only binding upon the parties consenting to the arrangement. In truth the effect of such assignments of dower is to bind

---

(*a*) 9 Vin. Ab. 266, pl. 3. Co. Litt. 32 *b*. (*b*) Perk. sect. 330. 5 Edw. 2. Avowry, 206. (*c*) Co. Litt. 173, a.

the widow and heir on account of their own agreement, and no other persons interested in the estate. This will satisfactorily appear from the cases which will be produced.

The proposition proved in the instances of advowsons and rents.

Thus, if the husband being seised of three manors, *A*, *B*, and *C*, to which three advowsons are appendant, grant the next avoidance of the three advowsons and dies, and then the heir assigns manor *A*, with the advowson appendant to it, to the widow for dower, and the widow agrees to and accepts such assignment, and the church becomes vacant, the *grantee*, not the widow, will be intitled to present to it; because the endowment not being of common right, the interest of the grantee is not over-reached and defeated by it. And upon the same principle, if the husband had granted a rent out of manor *A*, which was accepted by the widow in dower, this manor would continue charged with it after the assignment (*a*).

Exception to the last rule shown in an irregular assignment made by the sheriff.

An exception to this rule occurs when the endowment is not made by the heir *in pais*, but dower is assigned by the sheriff upon a judgment obtained by the widow in a writ of dower, in the making of which assignment he has not followed the directions of the common law in delivering to her seisin of one-third part of each kind of her husband's property to which her right of dower attached; in this case her acceptance and acquiescence under the assignment will not debar her of any of the privileges which she would have been intitled to, if her dower had been assigned in the form and manner which the common law requires.

In order to illustrate this exception from the last case of the manors A, B, and C, and the rent charge granted out of them; let us suppose the widow to manifest her intention to be endowed of common right in bringing a writ of dower, and to obtain the usual

---

(*a*) *Note* 2 to Co. Litt. 32, *b*. Perk. sect. 331.

judgment, and that the sheriff, by mistake in executing the writ of seisin, assigned to her manor A in lieu or satisfaction of dower out of it, and of manors B and C, instead of a third part of each manor as he ought to have done; the widow will, notwithstanding, be intitled to hold manor A discharged from the rent granted by the husband out of that manor. The principle is this; the assignment having been made under the authority of a court, it is to be considered as a legal and proper one whilst it remains uncorrected; it therefore intitles the widow to the same advantages as if the assignment had been made of common right, one of which is, the possession and enjoyment of the manor discharged from the rent (*a*).

But the following distinctions are to be observed in regard to the effect of the assignment of dower at common law upon incumbrances on the estate.

If they be made by the husband upon lands acquired by him *after* the marriage, the endowment will overreach such incumbrances, and the remedies of the creditors against the third part of the estate assigned in dower will be suspended during the widow's life. This has been shown from the cases before stated.

Incumbrances of the husband *before* marriage preferred to dower.

But if the incumbrances were effected by the husband *before* the marriage, by securities which did not prevent his widow's title to dower of the estate, her endowment would not suspend the rights of the creditors against the third part of the lands assigned to her in dower, because her title having relation only to the time when the marriage was solemnised, is preceded by the securities of the incumbrancers, who are, therefore, intitled to a priority; consequently she will

---

(*a*) 1 Roll. Abr. 684, pl. 50. Perk. sect. 330. But it is doubted whether this principle applies to the case of an advowson assigned for dower by the sheriff, the next presentation having been granted by the husband. Perk. sect. 381, 332. 9 Vin. Ab. 266, pl. 6.

be liable to them for the amount of their demands, to the extent even of the whole of her dower (*a*). But it is presumed, that as against her husband's general estate, she is intitled to have her dower exonerated from such incumbrances; for since her husband's heir, or devisee of the dowable estate, would be intitled to that equity, so, as it is conceived, would the widow also be.

But she is intitled to exoneration out of his general estate.

If, however, the debts were not of the husband's contracting, as when the estate descends to him before the marriage charged or incumbered, the widow must take her dower *cum onere*; for his own personal property is not liable to answer for the debts of other persons, and consequently not, in the present instance, to exonerate the dowable estate from incumbrances so made upon it (*b*).

Contra, if the debts were not of his contracting.

It has been noticed (*c*), that the widow is intitled to elect endowment between two seisins of her husband of the *same* estate at different times during the marriage. If, then, she elect to be endowed of the *second* seisin, it may be very prejudicial to her, since she will hold her third part of the estate, subject to all the incumbrances made by her husband, up to the period of his second seisin; for to that time only the assignment of her dower will have relation. An instance of this is illustrated in the following case:

Consequence of widow electing dower of her husband's *second* seisin.

The husband, being seised in fee of lands, granted a rent-charge out of them; he then made a feoffment in fee, and afterwards took back the estate in tail, and died. His widow recovered her dower. She then made a surmise that her husband *died seised*, and prayed a writ (which was granted) to inquire of the damages. It was adjudged, that in consequence of such surmise and prayer, the widow held her third part

---

(*a*) See *ante*, sect. 2, p. 371. (*b*) *Vide supra*, chap. 4.
(*c*) *Supra*, sect. 2, p. 386.

of the estate subject to the rent-charge, because she had elected her endowment under the *second* seisin of her husband, *before* which the rent was granted (*a*).

After assignment and entry widow's seisin of the freehold is complete.

The effect of the assignment of dower completed by the widow's entry, is to vest in her a *freehold* for her life in a third part of the estate; consequently *real* actions ought to be brought against her and the tenant of the freehold of the other two-thirds of the lands, when all of them are attempted to be recovered. Hence arises the necessity of making her a party-tenant to the *præcipe* for suffering a recovery of the whole estate, for if she be omitted, the recovery will be insufficient to bar the remainders limited of her third part of the lands after her decease (*b*).

In consequence of the freehold acquired by the widow in her estate in dower by the means before mentioned, she, or the grantee of her interest is capable of accepting a release of the reversion in fee of her third part, which estate will merge the particular one, and vest in them the absolute inheritance (*c*).

IV. Considering the widow to be in lawful possession of a third part of her husband's real estate, as tenant in dower, what I shall next consider will be the nature of her estate, her power over, and her rights in respect of it; her title to emblements, and to what duties or services she is liable in respect of her estate.

Widow's liability for waste committed,

1. The interest of tenant in dower is an estate for life; and, like other tenants for life, she is answerable for waste committed by herself, or by a stranger, whilst she continues tenant in dower (*d*). But after she has parted with her interest, and the heir has assigned the reversion, she is not liable for waste committed by any

---

(*a*) Co. Litt. 33. (*b*) Rowe v. Power, 2 New Rep. 1
(*c*) 2 Roll. Abr. 401. Co. Litt. 273. (*d*) Co. Litt. 53, 54. 2 Inst. 303. Fitz. N. B. 55, E. Ibid. 56, F.

person, for the reasons mentioned in chapter upon curtesy (*a*).

What, amongst other things, will be considered as waste, are pulling down houses, opening mines (*b*), cutting down trees, &c. (*c*). But it was adjudged in *Lewis Bowle*'s case (*d*), that if a house fell down *per vim venti* in the time of tenant in dower, she had a special property in the timber, in order to rebuild with it a house like the other for her habitation; and that if she cut down a tree for *reparation*, she had also a special interest in it for that purpose, but that she could not *sell* the tree; and in *Whitfield* v. *Bewit* (*e*), *Lord Macclesfield* appears to have acknowledged this distinction, and refused to allow a tenant for life, for repairs done, any of the proceeds from timber cut and sold by him, observing, that it was wrong to cut down and *sell* the timber, the sale of it evincing the motive of the cutting not to be for repairs, but to sell.

as felling timber, &c.

The instances which have been produced were of acts of *voluntary* waste. But whether the dowress, as tenant for life, is answerable for *permissive* waste, is a question upon which opinions differ. By permissive waste is to be understood permission by the dowress to let the buildings, &c. fall into ruins for want of repairs. Although there is, as I believe, no case to be found expressly decided upon this subject, yet it is conceived that she is answerable for this species of waste (*f*), for the following reasons:—first, because the heir has no possibility of preventing the houses, &c. from being destroyed from the widow's neglect, if she be not under a legal obligation to keep them at least in the same condition in which she found them; and the injury to the

As to the widow's liability for permissive waste.

(*a*) P. 36. (*b*) 2 P. Will. 242. 1 Taunt. 411. (*c*) For other particulars see Co. Litt. 53. (*d*) 11 Rep. 82. Co. Litt. 54 *b*. See Vin. Ab. Tit. Waste, M. (*e*) 2 P. Will. 240. (*f*) See Harg. Co. Litt. 57 *a*, *note* 1.

heir is the same as if she committed wilful waste; against which species of waste it is well known that the common law guaranteed the heir by subjecting the widow to a prohibition, if not to an action of waste. It is, then, but a fair presumption, that the law which gives her in dower a third of the estate, equally guaranteed the heir against her permissive waste, distinguishing between this interest created by the law, and the interests of tenants for life, years, &c. which are founded in contract among the parties, and the lessors, therefore, able to prevent permissive waste by express covenants; for which reason, if they omitted to do so, the common law gave them no redress for the permissive waste of such tenants (*a*). But, secondly, supposing that the common law did not make the widow answerable for permissive waste, it would seem that the statute of *Gloucester* (*b*) may be so construed as to make her answerable for this kind of waste. It declares "that a man from henceforth shall have a writ of waste against him that oldeth by law of *England* or *otherwise*, for term of life, or for term of years, or a woman in dower." Although one reason for the writ being thus given might be to remove the doubt which some persons entertained as to its lying against the widow at common law (*c*), yet the act makes no distinction between voluntary and permissive waste, but the writ is to go generally; and since this is a case which calls for a liberal construction of the statute, there is, as it is conceived, no reason why it should not be extended to *permissive* waste; such a construction having been put upon it, and upon the statute of *Marlbridge*, in regard to tenants for life, &c. when their leases are not made without impeachment of waste (*d*). If, then, the widow

---

(*a*) Co. Litt. 53 *b*. The Countess of Shrewsbury's case, 5 Rep. 13 *b*. (*b*) 6 Edw. 1, c. 5. (*c*) 2 Inst. 301. Bro. Abr. "Waste," 88. (*d*) 52 Hen. 3, chap. 23. 2 Black. Com. 283.

be liable for permissive waste, she would be answerable to the heir for the destruction of buildings by accidental fire, unless she were protected by the statute of *Ann* (*a*), which enacts that no action shall be prosecuted against *any person* in whose house any fire shall accidentally begin; with a proviso that the act shall not defeat any agreement between landlord and tenant. This act being remedial, and the language so general, it is conceived that it would include the widow tenant in dower in its indemnity (*b*).

Dowress not liable for accidental fire. *Semble.*

In order to prevent commission of waste by the dowress, a Court of Equity will restrain her by injunction from so doing, when she has shown an intention to commit it (*c*).

She will be restrained from committing waste by injunction.

The person intitled to the writ of waste is he who has the inheritance in remainder or reversion immediately expectant upon the estate for life, whether it be the heir or his assignee, or an assignee of the husband during his life.

Who intitled to a writ of waste.

Suppose, then, widow tenant in dower to grant her estate to a stranger, and the heir to convey the reversion in fee to *B*, that the tenant attorns, and the grantee of the widow commits waste; it seems that the assignee of the reversioner may have an action of waste against the grantee of the widow (*d*).

The widow or her grantee holds one-third of the estate of the inheritance. The writ of waste, therefore, lays the injury as committed to the *disherison* of the person intitled to such inheritance, and it would be erroneous to omit it. The form of the writ is shown upon the following case:

The writ must affirm the waste to be done to the disherison of the person intitled to the inheritance.

A, the husband, seised in fee of lands, dies, and his heir enfeoffs a stranger in fee, who assigns dower to

---

(*a*) 6 Ann, c. 31, ss. 6 and 7. (*b*) See Harg. Co. Litt. 57 *a*, *note* 1. (*c*) Whitfield v. Bewit, 2 P. Will. 240. (*d*) Fitz. N. B. 56, F.

A's widow, and then she commits waste. The writ of waste to be brought by the feoffee must state, that the widow held the lands in dower of the gift of her husband by the assignment of the stranger, of whom she held in dower, of the assignment which the heir made to the stranger, to the *disherison* of him who brought the writ (*a*). This writ, however, has almost fallen into disuse, being succeeded by an action on the case in the nature of waste.

Action on the case in the nature of waste now usual.

[But it seems to be doubtful whether an action on the case lies for permissive waste. The contrary has been decided by the Court of Common Pleas, in the case of a tenant at will (*b*), and in the case of a tenant for years (*c*); and the Court is reported to have laid it down generally, that the action would not lie for permissive waste, referring to the Countess of Shrewsbury's case (*d*) in support of that opinion. But the decision referred to was confined to the case of tenant at will, who from the nature of his interest, and from his not being within the statute of *Gloucester*, 6 Edw. 1. c. 5, was held not to be liable for permissive waste in any form of action: and it was not denied that the action on the case would lie against one who by law was bound to repair, which appears to have been the prevailing opinion previously to the two cases mentioned above (*e*).

Whether action on the case lies for permissive waste.

If, however, it should be determined that this action does not lie for permissive waste, it will be necessary in such cases to resort to the action of waste: and since that action cannot be brought in all cases, it will frequently happen that there will be no remedy unless relief could be given in equity, either by a decree to

---

(*a*) Fitz. N. B. 55, G. (*b*) Gibson v. Wells, 1 N. R. 290. (*c*) Herne v. Benbow. 4 Taunt. 764. (*d*) 5 Co. 13 *b*. Cro. Eliz. 777. 784. (*e*) See Cheetham v. Hampson, 4 T. R. 318. 1 Saund. 323 *a*, *note*. 2 Saund. 252 *a*, *note*. Jones v. Hill, 7 Taunt. 392. 1 B. Moore, 100.

put the premises in repair, or by the appointment of a receiver for that purpose. In general, however, Courts of Equity do not interfere in cases of permissive waste, as against one who holds by a legal title (*a*), except under particular circumstances (*b*).

Remedies for waste committed.

A dowress stands on the same footing as other tenants for life, in respect of her liability to make satisfaction for waste committed. During her life she may be sued for damages by an action on the case; and the value of the timber, or other property acquired by the waste, may be recovered against her in an action of trover, or by bill in equity for an injunction and account; and if the property thus acquired has been sold, it seems that an action of assumpsit will lie against her for the money produced by the sale (*c*). It was formerly doubted whether the assets of one who had committed waste were liable after his death, on the ground that waste is a tort, the remedy for which dies with the person. But it is now settled, that where property is gained by a wrongful act, the party injured may waive the tort, and have recourse to the action of assumpsit (*d*), which survives against the executors; an action will, therefore, lie against the executors of a tenant for life for the produce of waste committed; and as the demand is recoverable out of assets, it seems that a bill in equity will lie for the same purpose (*e*). This has been sometimes questioned, it being said that satisfaction for waste committed is to be decreed in equity, only where an injunction is prayed for, upon the principle that as Courts of Equity entertain jurisdiction to prevent the

---

(*a*) Wood v. Gaynon, Ambl. 395. (*b*) See Caldwall v. Baylis, 2 Mer. 408. (*c*) Hambly v. Trott, Cowp. 371. Hony v. Hony, 1 Sim. and Stu. 568. (*d*) Hambly v. Trott, *ub. sup.* See Lightly v. Clouston, 1 Taunt. 112. Foster v. Stewart, 3 M. and S. 191. (*e*) Bishop of Winchester v. Knight, 1 P. W. 406. See Garth v. Cotton, 3 Ath. 751 1 Ves. sen. 524. 546. 1 Dick. 183.

commission of further waste, they may, to prevent multiplicity of suits, at the same time give a remedy for the waste which has been committed (*a*). It seems, however, to be a question open to much doubt whether this be the only principle of the jurisdiction (*b*); if it be, it will follow that the account cannot be decreed against the party who has committed the waste, unless one of the objects of the suit be an injunction; and, therefore, after the determination of his estate, the only remedy against him will be by action (*c*). But the objection that the demand is of a legal nature will not, as it seems, apply after his death, to a bill in equity to affect his assets.

In cases of equitable waste committed by a tenant for life, it has been decided that a bill in equity lies against his executors for an account (*d*).

With respect to permissive waste suffered by a tenant for life, there is no remedy after his death (*e*).]

Forfeiture upon widow's alienation by common law conveyances for a longer period than her life.

The widow having only a freehold interest in the third part of her husband's freehold estates, cannot legally dispose of it for a longer period. The more effectually to prevent such dispositions, and to facilitate the remedies of the persons injured by them, it is provided by the statute of *Gloucester* (*f*), that upon the alienations of tenants in dower, in fee, or for the life of the lessee, they shall forfeit their estates, and the *heir*, or other to whom the land ought to revert after their death, be intitled to a writ of entry. And

---

(*a*) 3 Atk. 262. 6 Ves. 89. 9 Ves. 346. (*b*) See Whitfield v. Bewit, 2 P. W. 240. Lee v. Alston, 1 Bro. C. C. 194. 3 Bro. C. C. 37. 1 Ves. jun. 78. Hony v. Hony, *ub. sup.* (*c*) As in Jesus College v. Bloom, 3 Atk. 262. Ambl. 54. See 3 Atk. 381. (*d*) Lansdowne v. Lansdowne, 1 Madd. 116. Ormond v. Kynnersley, 5 Madd. 369. (*e*) Turner v. Buck, 22 Vin. Ab. 523. pl. 9. Castlemain v. Craven, ibid. pl. 11. Lansdowne v. Lansdowne, 1 Jac. and Walk. 522. (*f*) 6 Edw. 1. c. 7.

by two subsequent statutes passed in the reigns of Henry the seventh and Henry the eighth (*a*), it is further provided, that no feoffment, fine, recovery or warranty by tenant in dower, or, as expressed, having an estate in dower, shall operate as a discontinuance of her estate, or take away the entry of the heir or person in reversion. But as the effects of these statutes are reserved for particular consideration in the twelfth chapter of this treatise, the reader is requested to refer to that chapter.

No forfeiture by attempting to pass more than her lawful estate under modern conveyances.

The conveyances which create a forfeiture of the widow's estate for life, are such as from their natures pass a greater interest than that to which she is intitled, such as fines and feoffments, so that if she purport to grant a fee simple by lease and release, or bargain and sale (which are allowed to pass no larger estate than what the person conveying actually has), she will incur no forfeiture (*b*).

Lease with livery for the life of the lessee, a forfeiture.

If, however, the widow make a lease with livery for the life of the lessee, that will forfeit her dower, because by the livery a greater estate passed than she had to grant, viz. an estate during the life of the lessee, which may continue longer than her own (*c*).

But she may lease for years.

She may, however, grant leases of, or otherwise incumber her estate in dower to the extent of her life-interest; so that if she demise it for years, reserving a rent, it will be good, and if she die, and rents be in arrear, her executor or administrator will be intitled to them (*d*).

Her powe to regrar copyhol

It was adjudged in *Brown*'s case (*e*), that every person having a lawful estate *in* a manor, including a tenant in dower, may regrant copyholds at the ancient rents, customs, and services, which shall bind the owner

---

(*a*) 11 Hen. 7. c. 20. 32 Hen. 8. c. 36, s. 2. (*b*) See *ante*, p. 82. (*c*) Co. Litt. 252. (*d*) Bro. "Leases," pl. 19. (*e*) 4 Rep. 23 *b*. See Co. Litt. 58 *b*.

of the inheritance. The reason is, that the widow is lady of the manor for the time, and but an instrument, and passes no interest, the copyholder's estate being derived under the custom. If, therefore, the widow have one manor assigned for dower, then, although she have an interest in it for life only, yet being sole lady of such manor, she may regrant copyholds which are holden of it, the law enabling her to do so for the benefit of the copyholders; and it is presumed that she may equally do so of the lands lying within her part of the manor, when one-third of it only is assigned to her in dower (*a*).

Previously to the statute of 32 Henry the eighth,

Dower of the copyholds of a manor, how assigned.

(*a*) In Gay v. Kay, Cro. Eliz. 661, a woman having recovered dower of a manor, several of the tenements demised by copy were assigned to her; and it was decided that she might hold customary Courts for the purpose of granting copies. But as the widow held the part assigned to her under the heir (*post*, 428.), and as the fealty of the tenants was, notwithstanding the endowment, due to the heir (Keilw. 126. Perk. 345, 346), the jurisdiction of her Court was of a limated nature. See Bracton, 98. *a*. Fleta, book 5, c. 24, s. 15, 16.

In Bragge's case, Godb. 135. Gouldsb. 37. Owen 4. a widow sued for dower of a manor by the description of certain messuages, lands, and rents, and the sheriff assigned to her parcel of the demesnes and parcel of the copyholds. She afterwards held Courts and made a grant of a copyhold, which was adjudged to be void, because having made her demand as of a thing in gross, she had no manor: but if her demand had been of a third part of the manor, then she would have had a manor, and might have kept Courts and granted copies. According to the report in Owen it was said that the copyholds did not pass to her by the assignment of her dower. In Howard v. Cavendish, Cro. Jac. 621. Palm. 264. it appears that part of the copyhold tenements was assigned by the sheriff for dower.

According to these authorities, on the assignment of dower of a manor, some of the copyholds are allotted to the widow. But *Lord Coke* enumerates the "profits of Courts, fines, heriots, &c." amongst those things which are not divisible by metes and bounds, and of which the widow is therefore endowed of the third part. Co. Litt. 32. This implies that instead of dividing the lands held by the tenants of the manor, the third part of the profits arising from them may be assigned to the widow.

chapter 34, advantage of a clause of re-entry for the breach of a condition contained in a lease could only be taken by the lessor, his heirs, executors, or administrators; the lessor being a party and *privy* to the contract, and the other persons legally representing him being privies in *right*. If, then, this privity had been destroyed, as by an assignment of the reversion, the assignee could not enter for a breach of the condition; the reason of which distinction the reader will find in *Littleton* (*a*).

When the dowress may and may not enter for the breach of a condition.

But the above statute only alters the common law in favour of assignees or grantees, leaving the common law to operate upon estates created by act of law (*b*).

Suppose, then, the husband to have granted, previously to his marriage, a term of years of the dowable estate, with a clause of re-entry in the lease if the lessee committed waste, and that after the husband's death and the endowment of his widow, the lessee broke the condition; the widow cannot enter to determine the lease, because her estate being the creature of law, there is no *privity* between her, or the lessor, or his lessee (*c*).

But if no clause of re-entry be inserted in such a lease, and it is declared that upon waste committed by the lessee, the lease shall determine and be void, then

---

(*a*) Litt. sect. 347. (*b*) Co. Litt. 215 *b*. (*c*) However, the expression grantee or assignee in the stat. 32 Hen. 8. c. 34, has received a liberal construction (Isherwood v. Oldknow, 3 M. and S. 382): and there is great reason to contend that it comprises a tenant in dower, as she derives her title from the lessor. Lord Coke, in saying (in Co. Litt. 215 *b*.) that the statute does not extend to those who come in merely by act of law, instances only the case of the lord claiming for escheat or mortmain, or in respect of villeinage; and in 3 Co. 62 *b*. he gives the reason why the lord in those cases cannot have the benefit of the statute, viz. that he comes in by title paramount, and is in merely in the *post*, and not by any limitation or act of the party. It seems, therefore, that this passage was not meant to apply to persons claiming under the lessor. And see 4 Co. 50 *b*.

the widow may enter, because the lease is not merely voidable upon entry, as in the case first supposed, but it is *ipso facto* void without any entry (*a*).

Widow intitled to emblements, and may dispose of them.

2. With respect to the widow's title to emblements, her right to them is indisputable, since by the statute of *Merton* (*b*), tenant in dower is empowered to dispose of the corn growing upon her estate at the period of her death; that act having been passed to remove the doubt which previously existed upon the subject. That doubt was founded upon this reasoning, that the widow being intitled to an assignment of dower immediately after her husband's death, and having had the benefit of the corn then growing upon the third part of the lands assigned to her, if any there then happened to be (*c*), it was thought the advantages received by her at the commencement of her estate, should be a satisfaction of those of the same kind which she would otherwise have been intitled to when her estate expired. This peculiarity attending the widow's estate distinguished it from that of other tenants for life who are intitled to emblements; and to settle the law in this matter was the object of the above statute. This act places the widow in the same situation, with respect to emblements, as a tenant for life. Her power of disposition under the statute, therefore, does not merely extend to corn growing at the time of her death, but to roots planted, and to other annual and artificial profits, such as hemp and flax, and hops, although growing upon ancient roots, and to other things which are yearly produced by the industry of man (*d*). If she omit to dispose of them, they will belong to her executor or administrator, who may retain possession

Of what they consist.

If no disposition, her executor or administrator will be intitled to them.

(*a*) Gamock v. Cliffs, 1 Leon. 60, 61. (*b*) 20 Hen. 3. c. 2.
(*c*) See Fisher v. Forbes, 9 Vin. Ab. 373, pl. 82. Dyer, 316 *a*.
(*d*) Co. Litt. 55. 1 Roll. Abr. 728. Cro. Car. 515. Keilw. 125.

of the lands until the corn, &c. can be reasonably carried away (*a*).

It follows, from tenant in dower being in the same situation as a tenant for life, in regard to emblements, that the same principles will regulate her right to them as are applicable to other tenants for life. The fundamental reason for admitting such right is to encourage husbandry, by allowing the tenants a full compensation for their labour and expense in tilling, manuring, and sowing the lands, and this principle is the basis of the following cases:

Instances of widow's title to emblements.

If there be two tenants in common in fee of lands, and the one marries and dies, and his widow, after endowment, and the surviving tenant in common sow the lands, and she dies before the corn is cut, her executor or administrator will be intitled to the corn in common with the other tenant (*b*).

So also, if the widow, after assignment of dower, sow the lands and marries, and her second husband, after appointing executors, dies before the crop is severed, his surviving widow will be intitled to it. But the executor, and not the widow, would have been intitled to the crop if it had been sown by the husband, because he was at the expense of sowing it (*c*).

[The widow of a copyholder who forfeits her freebench by a second marriage is not intitled to the emblements (*d*).]

Widow liable to one-third of duties to which estate is subject.

3. The duties or services to which the widow is liable in respect of her dower, are founded upon her title to the estate. Her interest, as we have seen, is a continuation of her husband's seisin; she is consequently liable, as standing in his place, to one-third of all the duties and services to which the estate was sub-

---

(*a*) Keilw. 125. pl. 84. (*b*) Perk. sect. 523. (*c*) Perk. sect. 522. Co. Litt. 55 *b*. (*d*) Oland's case, 5 Co. 116. Cro. Eliz. 460. See Co. Litt. 55 *b*.

ject in his possession, and for which one-third she is answerable to the person intitled to the reversion of the property (*a*).

An instance of this attendancy of the widow upon the reversion for one-third of the services has been before noticed (*b*), in the case of a rent reserved upon an estate tail granted to the husband, which expired at his death without leaving issue; there the widow being dowable of the estate tail notwithstanding its determination, the law decided that, in respect of one-third of the estate assigned to the widow for her dower, she should be attendant upon and pay to the donor one-third of the rent originally reserved (*c*).

So also she must contribute one-third of the interest upon a mortgage debt.

Upon the principle applicable to these cases, if the estate be subject to a mortgage for a term of years granted before the husband became intitled to it, his widow will be obliged to keep down one-third of the interest, as it has been noticed (*d*).

The liability of the widow to contribution for part of the duties reserved out of the dowable estate is, as before observed, founded in justice; on the principle that the owner of two-third of the estate should not be obliged to pay over the whole of such reservation, but that the proprietor of the other third should contribute *pro rata*. It is also equal justice, that if the heir or his grantee become discharged of the render or duty, it should operate in favour of the widow.

Release by the donor or reversioner of the ser-

Accordingly, if the husband's estate upon its creation were subject to a rent, and the reversioner or donor of

---

(*a*) 9 Rep. 135. Perk. sect. 424, 5, 7. (*b*) *Supra*, p. 376. (*c*) Co. Litt. 241. Perk. 431. 9 Vin. Ab. 268, pl. 5, 6. So if the husband died without heirs, and the land escheated, the widow held her dower of the lord, rendering to him a third of the rents and services. 9 Vin. Ab. 268, pl. 7, 9. In other cases the dowress, in point of tenure, held of the heir. F. N. B. 7. F. Co. Litt. 241, ibid. 31 *a*, n. 2. Watk. Cop. vol. 2, p. 152. (*d*) *Supra*, p. 371.

the estate, or the person to whom it is payable, release the whole or part of it to the heir, the widow will also hold her dower discharged from it, a third of which she was previously liable to pay to the heir (*a*).

vices to the heir will enure to widow's benefit.

When the reservation or duty is entire and indivisible, and to be rendered annually, as of a horse, the widow's attendancy upon the heir in respect of it, will be not of the third part of the value of the horse yearly, but a horse every third year, by which arrangement the law prevents disputes between her and the heir. If, however, the reservation had been an annual render of a horse of the value of 40*l*, then the widow would be attendant upon the heir yearly for one-third part of that sum (*b*).

How the widow is to answer to the heir her third, when the service is entire.

V. The widow's title to dower, and the manner in which her dower is to be assigned, having been shown in the preceding sections; her remedy for the recovery of it is the next subject which naturally presents itself for consideration. Her redress is either in a Court of common law or in a Court of equity, each of which jurisdictions will be considered separately.

1. When dower is refused to be assigned to the widow, she may sue out a writ of dower *unde nihil habet*, which lies against the person only who has the freehold, and who ought to have assigned to her dower without compulsion. The process is by summons, *grand cape* and *petit cape*, in the Court of Common Pleas; and if the lands lie in *London*, the writ of dower is directed to the Lord Mayor and Sheriffs (*c*).

In the *præcipe* for this writ, when the widow is first named she ought to be described as having been the *wife* of her late husband; for in a case where this was

Proceedings in a writ of dower. Præcipe, &c.

(*a*) Co. Litt. 241. Perk. sect. 430. Bro. "Tenures," fo. 252 *b*. pl. 33, 82. (*b*) Perk. sect. 434. The reader will find a variety of ancient learning upon this subject, in the author referred to, between sections 424, and 435. (*c*) Fitz. N. B. 148. Lomax v. Armorer, 1 Ventr. 267.

omitted in the writ, and the sheriff was ordered by it to command the tenant "to render to *C* her reasonable dower out of the freehold which was of *D* late her husband," the Court abated the writ; because in the beginning of it *C* was not mentioned to have been the wife of *D*, which was the very character in and upon which *C*'s title to dower was founded (*a*).

Summons.

The next proceeding is a *summons* to the tenant to render the dower, which must be served upon the land (*b*). That being done, the summons is required by the act of *Elizabeth* (*c*) to be proclaimed fourteen days at least before its return, upon a *Sunday* immediately after divine service and a sermon, if any, or immediately after divine service, at or near the more usual door of the church or chapel of the town or parish where the lands are situated upon which the summons was made. The statute further requires the proclamation to be returned with the names of the summoners, and it declares that until a summons shall have been so proclaimed, no grand *cape* shall issue, but summons after summons till one duly proclaimed shall have been made and returned.

Proclamation.

The proclamation is to be made at the door of the parish church; the act requiring this must be literally complied with, although the church or chapel be not in the county where the lands lie (*d*). But if the lands be situate in different parishes or townships, the proclamation of the summons at the door of one church or chapel where *part* only of the lands lie has been held to be sufficient (*e*).

Essoin.

The writ, &c. being returned, the tenant may cast an *essoin*, *i. e.* an excuse for his non-appearance at the return of the writ: that is a dilatory proceeding, and

---

(*a*) Fulliam v. Harris, Cro. Jac. 217. (*b*) Allen v. Walter, Hob. 133. (*c*) 31 Eliz. c. 3, sect. 2. (*d*) Cro. Eliz. 472. (*e*) Harrison v. Massam, Noy, 22. Allen v. Walter, Hob. 133.

therefore discountenanced. The essoin will be of no avail if he be seen in Court, or if the entry of it with the clerk of the essoins appear to have been made for him by an attorney (*a*); and if the essoin be not cast at the proper time, the demandant may enter a *ne recipiatur*.

The essoin being legally cast, then in order to prevent the tenant from signing a *non pros* after the service of a rule by him of his intention to do so, the demandant should adjourn the essoin, which, by statute (*b*), is to the fourth return next after that of the writ of dower both inclusive. Adjournment.

The next proceeding in default of the tenant's appearance is the issuing of the *grand cape* by the demandant, a term borrowed from the word *cape* in the beginning of the writ. It directs the sheriff to take into his possession, by the view of an inquest, a third of the lands, for the tenant's default, and then to summon the tenant to appear in Court at *Westminster* to account for his prior non-appearances. If the sheriff make no return to that writ, then an *alias grand cape* issues; and should the tenant still refuse to appear, the demandant may obtain final judgment, and an award of seisin. Grand cape in default of appearance. *Alias* grand cape. Judgment.

The demandant, however, may waive her advantage, and accept an appearance of the tenant upon the *grand cape* (*c*). Which circumstance introduces the consideration of the proceedings in a writ of dower, when there is no default of appearance in the tenant. Proceedings when there is no default of appearance.

We shall suppose then, the tenant to appear at the return of the writ of dower. The demandant must afterwards *count* or declare, by which she ought to demand a *third* part of the whole of what she is dowable (*d*). The count being filed, if the tenant claim The count. Tenant's right to a view.

(*a*) Anson v. Jefferson, 2 Wils. 164. (*b*) 24 Geo. 2. c. 48, sect. 3. (*c*) 1 Salk. 217. (*d*) 3 Lev. 169.

the lands under the alienation of the husband, he was intitled, as it would seem, to pray a *view*, in case such proceeding was really necessary, as if he were ignorant of the particular lands in his possession which were liable to the widow's demand, otherwise not; for if it appeared that he was acquainted with that circumstance, then the Court would not accede to his prayer of a *view*, the request being merely for delay, which is not allowable in such an action (*a*). But the statute of *Westminster* the second (*b*), proceeding upon the above distinction, deprives him of a *view*, by declaring that, "in a writ of dower where the dower in demand is of land which the husband aliened to the tenant or his ancestors, where the tenant *ought not* to be ignorant what land the husband did alien to him or his ancestors, although the husband died not seised, yet from henceforth *view* shall not be granted to the tenant." The alienee of the husband being thus excluded from a *view* (*c*), and the heir of the husband who died seised of the lands being equally excluded at common law, because the legal presumption is, that he was acquainted with the estate which descended to him upon his ancestor's death (*d*), a case can scarcely happen of a tenant in dower being intitled to a *view*. If, however, he should pray one, when he is not intitled to have it, the demandant must defeat it by what is called a *counter plea*, upon which issue may be taken, or to which the tenant may demur; and if he adopt the latter mode, and judgment be given against him, it will be peremptory; but if the decision be in his favour, and a view granted, he will be intitled to an *essoin*, similar to that before mentioned, and the demandant must *count de*

Counter plea. Proceedings in consequence, by demurrer, or plea.

(*a*) Upon this subject see the cases of Astmal v. Astmal, 2 Lev. 117. Davis v. Lees, Willes' Rep. 344—347. Herbert v. Vernon, Dyer, 179 *a*, pl. 41, and Whelpdale v. Whelpdale, 3 Lev. 169.
(*b*) 13 Edw. 1. c. 48. (*c*) Bernes v. Rich, 3 Lev. 220.
(*d*) 2 Inst. 481.

novo after the return of the *view*, or of the adjournment of the essoin; which being done, the tenant may *plead* either in *abatement* of the writ, as the demandant's marriage during the action, or ancient demesne (*a*); or in *bar* of the action, as *ne unques seisie que dower*, or a divorce *a vinculo matrimonii*, &c. (*b*).

Issue.

If the marriage of the widow with her late husband be not disputed (*c*), and issue is joined upon a fact within the province of a jury, upon which the demandant's right to dower is denied, the question is to be settled by a jury in the usual manner; and in case the issue be found for the widow, she will obtain judgment for her dower, and a writ of seisin will be addressed to the sheriff to assign it, who ought to do so in the manner mentioned in the third section.

Judgment.

Execution.

No imparlance allowed. No parol to demur.

No imparlance is permitted in the above action (*d*), nor is the *parol* allowed to demur on account of the infancy of the tenant (*e*); because any delay would be prejudicial to the widow, who is suing for the recovery of her daily subsistence.

Distinction between grand and petit capes.

The distinction between *grand* and *petit capes* is this: the former never lies after an appearance by the tenant in chief; the latter issues after the tenant has appeared, and makes default in any term *subsequent* to his appearance. Thus, if the tenant appear to the summons, and the plaintiff make her demand, and in the *same* term in which the tenant appeared he make default, or *nihil dicit*, the plaintiff ought to have peremptory judgment of seisin, and no *grand* or *petit cape* is proper to be issued after such default. If, however, either of them be taken out, and the plaintiff finally obtain judgment, the tenant cannot reverse it for the

---

(*a*) 1 Roll. Abr. 322, pl. 20. Co. Entr. 173 *b*. (*b*) Co. Litt. 32. (*c*) See *supra*, p. 334. (*d*) Foster v. Kirkley, Barnes, 2. (*e*) *Supra*, p. 389. 1 Roll. Abr. 137, pl. 35. See also Gore v. Perdue, Cro. Eliz. 309. Smith v. Smith, Cro. Jac. 111. 3 Leon. 392.

Error in judgment, who may take advantage of it.

error; because such dilatory proceeding instead of being prejudicial to him operated to his *advantage*, and the rule is generally laid down by *Fitzherbert* that no person can reverse a judgment by writ of error for mistake in the proceedings, unless he can show that such mistake was to his prejudice, for that is the very foundation and *expression* of the writ (*a*). But this rule must be applied to cases only arising upon *process* in the actions, *i. e.* to errors originating in the mistake of a party, as in the last case, and not in the judicial act of the Court; for if the Court pronounce an erroneous judgment, any of the parties in the cause is intitled to have it reversed or corrected by a review before a Court of Error (*b*).

If widow were in part endowed, writ of *unde nihil habet* lay not at common law.

It appears from the form of the writ of dower *unde nihil habet*, that it would be inconsistent to apply it to cases where the widow had received *part* of her dower; and accordingly we find that in such instances she was excluded by the common law from the writ, and was put to her writ of *right* of dower to recover the remainder (*c*). This was an inconvenience partially remedied by the statute of *Westminster* the first (*d*),

Statute of Westminster 1. a partial remedy.

which provides that the writ shall not abate upon the tenant's allegation that the widow has received part of her dower from any *other* person before the writ was purchased, *unless* he can show that she received such part *from himself*, and in the same town or vill, previously to the issuing of the writ.

Plea of part endowment since the statute.

Hence it appears, that the tenant against whom the writ *unde nihil habet* is brought, may, since the passing of the act, plead in abatement of it, that he had, prior to its issuing, endowed the widow in *part* of the lands in the same town or vill (*e*). But the plea ought not

---

(*a*) Coke's Entr. 171. Plow. Com. 41. Fitz. N. B. 21 F.
(*b*) 8 Rep. 59. Yelv. 107. 2 Stra. 972. (*c*) 2 Inst. 262. F. N. B. 8. C. (*d*) 3 Edw. 1. c. 49. (*e*) See 2 Inst. 262—263.

only to state that the widow is seised of part of her dower, but also that it was of the tenant's own assignment, because such an assignment by a *stranger* would not be a good answer to the writ since the passing of the above statute (*a*).

When part aliened by husband, dower assigned out of the remainder.

[*If* the husband had aliened part of his lands with warranty, and left other lands in the same county which descended to the heir, the whole of the widow's dower was to be assigned to her out of the descended lands, if of sufficient value, in exoneration of the alience: hence if the widow brought her writ of dower against the latter, and the heir being vouched, admitted the warranty, and that he had assets by descent in the same county, the widow had judgment for her dower against the heir, and the tenant held in peace (*b*). If the lands were in different counties, the widow had immediate judgment against the tenant, leaving him to recover over in value against the heir (*c*).

Proceedings in dower against alienee when the heir was vouched.

When the heir was vouched in respect of lands in the same county, if, instead of admitting himself to be bound, and entering into the warranty, he counter-pleaded it, judgment was, it is said, postponed; until after the trial of the issue between the husband's alienee and the heir (*d*), but according to other authorities, the widow was not to be delayed by the pendency of this question, but was entitled to immediate judgment against the tenant (*e*).

If the heir on being vouched entered into the warranty, but pleaded that he had no assets, and issue was joined on that plea, the widow did not, as it seems, obtain her dower from the tenant, until the issue was tried (*f*);

(*a*) 9 Vin. Abr. 275. pl. 10. in marg. (*b*) 9 Co. 18, 19. Co. Litt. 39 *a*. note 6. Booth on real actions, 170. (*c*) 22 Vin. Ab. 79. pl. 5, 6. ibid. 80, pl. 7. ibid. 127, pl. 3. Br. Voucher, 4. Br. Dower, 2. (*d*) Jenkins, 176. 22 Vin. Ab. 127, pl. 2. (*e*) Co. Litt. 39 *a*, note 6. 22 Vin. Ab. 127, pl. 1, 7. ibid. 139, pl. 9. Br. Dower, 21. (*f*) Jenkins, 176.

she might however have an immediate judgment against the tenant, but with a *cesset executio* until the trial of the issue (*a*), under which she would be entitled to her dower against him, unless it was found that the heir had assets, and in that case it seems that another judgment would be given for the widow to recover against the heir and for the tenant to hold in peace (*b*). However, in the case where the heir denied having assets, the widow, instead of leaving that question to be decided between the heir and the tenant, might elect to take a conditional judgment to recover her dower from the heir, if he had assets in the county, and if not, from the tenant (*c*); and the reason why this election was allowed to her, was said to be, that it might be for her benefit to recover her dower from the heir, rather than from the alience, as the heir was bound to warrant to the widow the land of which she was endowed by him, which it seems was not the case when she was endowed by another (*d*).

These rules applied only when the heir was vouched immediately by the tenant. If the tenant vouched one, who vouched the heir, the judgment for dower was against the tenant alone (*e*).

As the wife's dower was properly assignable out of the lands descended to the heir, if he had assigned her part of those lands in satisfaction of her whole dower; before the writ brought against the alience, the latter might plead the assignment in bar (*f*). And it seems that this would be a good defence, although the lands assigned were in another county, at least if the widow had accepted the assignment (*g*).

(*a*) Goldingham v. Saunds. Winch. 81. 88. Hutton, 71. Cro. Jac. 688. See Killigrew's case, Cro. Eliz. 46. (*b*) Hutton, 72. (*c*) Grey v. Williams, Dyer, 202 *b*. Co. Litt. 39 *a*. note 6. 22 Vin. Ab. 64, pl. 4. (*d*) 9 Co. 18. Winch. 88. See Park on Dower, 275. (*e*) 9 Co. 18. Co. Litt. 39 *a*, note 6. 22 Vin. Ab. 79, pl. 2, 3. (*f*) Co. Litt. 35 *a*. (*g*) See Perk. 409. Jenk. 41. Carter, 187.

If the husband alienes his estates in parcels to different persons, the widow recovers from each of them, the third part of the lands conveyed to him (*a*). And if one of these persons has assigned her a portion of his lands in satisfaction of her whole dower, it seems that the others could not plead this assignment as a legal defence to writs of dower brought against them (*b*).

Assignment of dower when the lands were aliened to different persons.

The rule of charging different estates proportionally was also observed, when the heir was vouched in a writ of dower, and was in ward to several guardians, in consequence of having several estates held by knight service (*c*). But when the heir being an infant had lands of socage tenure, and others held by knight service, it seems that the widow's dower was assigned to her out of the former, leaving the latter discharged for the benefit of the lord as guardian (*d*).]

When dower was detained from the widow, and she obliged to bring a writ of dower, she was by the common law intitled to the profits of her third part of the lands from the time only when she recovered judgment; for the tenant was permitted to retain the profits of the estate intermediate the recovery against him in possessory actions, and his entry into possession, to enable him to perform the feodal services; so that in all these actions (except in *novel disseisin* against the disseisors only (*e*)), no damages were recoverable by the demandants. This rule being found unjust in process of time, when the actual performance of the feodal duties began to be discontinued, statutes were made giving damages and costs in various possessory actions (*f*); upon one of which occasions it was provided by the statute of *Merton* (*g*), that widows deforced of dower, in lands

At common law damages for dower not recoverable prior to the judgment.

Now given by the stat. of Merton, the husband die seised.

(*a*) Perk. 423. (*b*) Co. Litt. 35 *a*. Sed vid. Perk. 402. (*c*) Co. Litt. 38 *b*. n. 2. 22 Vin. Ab. 168, pl. 6. Br. Voucher, 38. (*d*) Litt. sec. 48. Co. Litt. 38 *b*, n. 2. (*e*) Stat. 6 Edw. 1, c. 1. (*f*) Marlb. 52 Hen. 3, c. 16. 6 Edw. 1. c. 1. (*g*) 20 Hen. 3. c. 1.

of which their husbands *died seised*, and unable to recover the same without plea, should, upon such recovery, be intitled to *damages* against the deforcer, viz. the value of their dower from the deaths of their husbands unto the day when, by judgment of the Court, they should have recovered *seisin* of their dower (*a*).

The following remarks arise from the consideration of the above statute.

First, that the husband is required to *die seised* of the freehold and inheritance.

If, then, he make a feoffment to the use of himself for life, remainder to his son in tail, and die during the continuance of the intail, his widow will not be intitled to damages under the statute; because her husband was only actually seised of an estate of freehold when he died, viz. for his life, with a reversion expectant upon the determination of an estate tail (*b*).

But a term for years carved out of the estate will not, as it has been before shown (*c*), prevent the husband's seisin of the inheritance. If, therefore, the lands of which the widow is dowable be subject to a demise *for years*, created by the husband previously to the marriage, upon which a *rent* is reserved, his widow will be intitled to recover a third part of the reversion, and a like proportion of the rent and *damages*, because the husband died seised of the freehold and inheritance (*d*).

The act extends to copyholds,

Secondly, that the act extends to copyhold or customary lands when the widow is intitled to free-bench; for a title to the principal draws to it all incidents, one of which is damages under the statute (*e*).

and to assignments of dower under decrees in Chancery,

Thirdly, that the statute extends to assignments of dower under decrees of Courts of equity; for the passage in *Lord Coke*'s commentary upon the 36th section

---

(*a*) 2 Stra. 972. (*b*) Vide note 4, to Co. Litt. 32, *b*. (*c*) *Supra*, p. 371. (*d*) Co. Litt. 32, *b*. (*e*) Shaw v. Thompson, 4 Rep. 30, *b*. Co. Litt. 33, *a*.

of *Littleton*, viz. "that if the wife have dower assigned to her in Chancery she shall have no damages," is to be understood as alluding to the writ *de dote assignanda* issued by that Court, and not to a *decree* of a Court of equity; and the reason why no damages are recoverable upon that writ is, that the widow is not *deforced* of dower (*a*).

but not, as it seems, to writs of right of dower.

Lastly, it should seem that the act does not extend to a writ of *right* of dower, because the damages given by the statute appear to have reference to cases where there is no doubt of the widow's right, and the possession only is wrongfully withheld. And in writs of right no damages are given, because when the right is doubtful, no injury can arise to either party until the right be clearly and firmly ascertained and settled (*b*). In addition to these damages the widow is intitled to *costs* by virtue of the statute of *Gloucester* (*c*), which gives costs in all cases where the party is intitled to damages.

Widow's title to dower, damages, and costs at common law and under the statutes of *Merton* and *Gloucester*, when husband *dies seised*.

Under the statutes of *Merton* and *Gloucester*, and of common right, the widow's title to dower, &c. stands thus:

She is intitled to endowment of a third part of the freehold lands and tenements of which her husband was solely seised, in fee simple or fee tail, in fact or in law, at any time during the marriage.

If he *die seised*, and her dower be detained from her, she is intitled to recover it in a writ of dower, with damages, *i. e.* one-third of the value of the lands from her husband's death until she recover judgment of seisin; 2dly, compensation for the loss that she has sustained from the detention of it; and, 3dly, her costs (*d*).

(*a*) 2 Bro. C. C. 631; and for the nature of the writ, see Fitz. N. B. 263. C. and ante, p. 409. (*b*) Co. Litt. 32, *b*. (*c*) 6 Edw. 1. c. 1. (*d*) On the subject of the damages to which the widow is intitled, see Co. Litt. 32, *b*. *n*. 4. 2 Saund. 44, *e*. note. ibid. 331. Hawes's case, Hetl. 141. Bull, N. P. 117. Park on Dower, 306. *et seq*.

The damages may be carried down to the inquisition on a writ of inquiry, and may exceed one-third of the value.

But the inquisition will be quashed if proper allowances be not made to tenant.

Also, if judgment be obtained upon the default or *nihil dicit* of the tenant, and a writ of inquiry issues to ascertain the damages given by the statute of *Merton*, they may be carried down to the time of the inquisition, supposing that the widow was not previously in possession of her third part of the lands under execution awarded upon such judgment; but the jury's assessment may exceed one-third of the value, since the widow may have sustained damage to a greater extent, in consequence of the detention of her dower (*a*). If, however, the damages be assessed without allowances for land tax, repairs, or chief-rents, the assessment is erroneous, and the inquisition will be set aside: for, under the words *ultra reprisas* in the writ of dower, deductions of such and the like articles ought to have been made (*b*).

Widow not intitled to mesne profits, damages, or costs, if husband did *not* die seised.

If, on the other hand, the husband did *not* die seised, having aliened the lands, the widow will not be intitled at law to *mesne* profits, damages, or costs, because such a case is not within the provisions of the statutes of *Merton* and *Gloucester*; and by the common law, as we have seen, she was only intitled to recover one-third of the lands and of their value from the time she obtained judgment for her dower (*c*).

Contra, as against the heir's alienee.

But if the *heir* alien the lands after the husband's death, and the widow recover dower against the *alienee*, she will be intitled to mesne profits and damages against him to be computed from her husband's death; and it will be no excuse for him to say, that he has not been in possession of the premises during the whole of that period, because damages, including mesne profits,

---

(*a*) Walker v. Neville, 1 Leon. 56. Dobson v. Dobson, Ca. temp. Hardw. 19. See Co. Litt. 32. *b*. *n*. 4. (*b*) Penrice v. Penrice, Barnes, 234. (*c*) It is said in Jenkins, (p. 45) that where the husband does not die seised, if the widow demands her dower and the tenant refuses, she shall recover damages from the time of the refusal: but this dictum is not supported by the other authorities, and the case is certainly not within the statute of Merton.

having been given to the widow when her husband died seised, she can only bring her writ of dower against the tenant of the freehold, which, in this case, is the alienee of the heir (*a*).

Particulars to be found by a jury for the widow.

The following particulars are necessary to be found by a jury when the widow recovers in her suit: 1st, that her husband *died seised*; 2dly, the yearly value of the lands on tenements; 3dly, the damages which she has sustained from the detention of her dower; and, 4thly, her costs. Yet if any of these requisites be imperfectly found or omitted by the jury, the defect may be remedied by the award of a writ of *inquiry* (*b*). And if the value *de tempore mortis*, and the damage *occasione detentionis dotis* be mixed in the verdict, and not assessed separately, yet the assessment will be good (*c*).

Defects supplied by a writ of inquiry.

Judgments for dower and for damages are distinct and independent.

It appears from the foregoing observations, that the judgment for dower of a third part of the lands by metes and bounds, being founded on the common law, and the award of damages and costs being made in consequence of the statutes of *Merton* and *Gloucester*, are separate and distinct judgments. Hence an act of the widow which may deprive her of the benefit of the one, may not in the least degree prejudice her interest in the other, as will appear from the following cases:

So that widow's release of damages *detentione dotis* will not bar her right to mesne profits.

If, then, a widow release to the tenant damages *occasione detentionis dotis*, it will not bar her right to the mesne profits (*d*). And upon the same principle, the first judgment of seisin in favour of the widow may be confirmed upon a writ of error, before the second judgment is given for damages (*e*); and the second judgment may be reversed without prejudice to the

---

(*a*) Belfield v. Rowse, Co. Litt. 33, *a*. Mo. 80. 4 Leon. 198. Bull. N. P. 117. Another reason is, that the alienee cannot plead *tout temps prist*, post, 445. (*b*) Butler v. Ayres, 1 Leon. 92. (*c*) See note 4, to Co. Litt. 32, *b*. (*d*) Harvey v. Harvey, T. Raym. 366. (*e*) 1 Lev. 38.

And first judgment may be confirmed before the second is given, &c.

first, so that the judgment intended by the statute of *Merton* is not the first but the second (*a*).

From these adjudications it follows, that the damages and costs given by the statutes of *Merton* and *Gloucester* may be lost after the first judgment of seisin is pronounced.

So also the widow may enjoy the benefit of the first, and by the tenant's death lose the second.

Suppose, then, the first judgment to be merely that the widow shall recover *seisin*, and which is done and executed; and the tenant dies before the second judgment is obtained for damages and costs under the statutes of *Merton* and *Gloucester*; they are gone by his death, and no *scire facias* will lie against his heir to obtain a writ of inquiry of them, because they are considered a *personal* demand, and like damages in trespass, if they be not recovered during the life of the party, they die with him (*b*).

Upon the same principle, if the widow, the demandant, had died before execution of a writ of inquiry for damages and costs, her executor or administrator would not have been intitled to a *scire facias* for them (*c*). Yet an instance may occur in which the tenant's death will not deprive the wife of her right to damages and costs.

Exception to the rule that damages and costs are lost by the death of the party.

Thus, if her demand be against *two* tenants of the freehold, and she recover judgment for her dower, damages, and costs against *both* of them; if one of them die, the *survivor* will be answerable to the widow for the whole of the damages and costs, because both tenants are considered *joint*-trespassers (*d*).

Remedy by act of Charles the second, for damages between writ of error and affirmance of the judgment.

The statute of *Merton*, in giving damages to the widow, was introductive of a new law; the method, therefore, prescribed in it was to be particularly observed.

(*a*) 2 Str. 971—3. (*b*) Aleway v. Roberts, 1 Sid. 188. 1 Lev. 38. See 2 Bro. C. C. 629. (*c*) Mordant v. Thorold, 1 Salk. 252. Show 97. 3 Mod. 281. (*d*) Kent v. Kent, 2 Stra. 971. Ca. Temp. Hard. 50. Ridgeway, 21. 2 Barnard, 357, 386, 441.

The act, as we have seen, authorises Courts of Law to award damages to the effectual judgment for recovery of seisin in the Court where the writ of dower is brought. Hence, if the tenant issued a writ of error upon a judgment obtained against him for dower, damages, and costs, the Court of error could not under the act give additional damages from the writ of error to the affirmance of the judgment. To remedy this inconvenience the legislature interposed, and by an act passed in the reign of Charles the second (*a*), it is declared, that in writs of error to be brought upon any judgment after verdict, or in any action of ejectment, no execution shall be stayed unless the plaintiff in error become bound to pay such damages and costs as shall be awarded, in case the judgment be confirmed, or the plaintiff discontinue or be nonsuited; and that the Court below, upon affirmance of such judgment, &c. shall issue a writ of inquiry, to ascertain the *mesne* profits and damages by waste after the first judgment, and upon the return of the writ, shall give judgment and award execution for them, and also for the *costs* of the suit.

The statute requiring the plaintiff in error to enter into a recognizance, &c.

Since the passing of the above statute, the plaintiff in error enters into a recognizance, with sureties, to answer in damages and costs: and if the judgment be affirmed, the defendant may recover his costs singly by an action upon the recognizance; and he may at the same time have a writ of inquiry to ascertain the mesne profits, and the Court will not stay the proceedings for recovery of the costs, till the costs and mesne profits are ascertained and paid (*b*).

Upon which the costs may be recovered by action.

Effect of recognizance in regard to the liability of parties to the writ of error.

The recognizance required by the act may have the effect of rendering persons liable to the widow for damages and costs, upon whom she would otherwise

---

(*a*) 16 and 17 Car. 2, c. 8, ss. 3 and 4.

(*b*) Doe v. Roach, Ca. Temp. Hardw. 373.

have no claim. An instance of this occurred in *Kent* v. *Kent* (*a*), before referred to.

In that case the widow obtained judgment for her dower, with damages and costs, against *two* tenants of the freehold, who brought a writ of error; and whilst the writ was pending, one of them died. The writ having abated by that event, the *heir* of the deceased, and the surviving tenant, joined in a new writ of error, and both of them entered into the usual recognizance to pay damages and costs, if the judgment should be confirmed, which finally happened. This undertaking of the heir was held to subject him, equally with the surviving tenant, to the damages and costs, which circumstance, with others, vitiated the judgment in error, that charged the surviving tenant *singly* with the payment of those costs and damages.

Having briefly traced the proceedings under the writ of dower *unde nihil habet*, I shall conclude this subject, after a few remarks upon the usual modes of defence which are made to the widow's title to mesne profits, damages, and costs, by the pleas of *tout temps prist*, and detainment of charters.

Necessary at law that widow should make a demand of dower, to intitle her to damages, &c.

When the husband dies seised, his *heir* succeeds to his estate by legal right; so that his entry and enjoyment of it being under a lawful title, he does no wrong in retaining the possession of the whole, until he be demanded by the widow to assign and deliver up to her a third part of it for her dower. Previously to such demand, the widow's title to damages under the statute of *Merton* is defective, for it only gives them to such widows who cannot obtain their dower *sine placito*, *i. e.* without suit, after a prior demand. *Lord Coke*, therefore, recommends the widow to demand her dower before good testimony as soon after her husband's death as she is able (*b*), in order to obviate all doubt as

---

(*a*) *Ante*, p. 442. (*b*) Co. Litt. 32, *b*.

to her title to recover damages and costs. If, however, the widow have made no demand of dower prior to the suing out of her writ of dower, the heir may plead *tout temps prist*, and pray that she may not have damages; and if the plea be true, the widow will lose the mesne profits and damages from the death of her husband to the commencement of the suit, from which latter period to the execution of the writ of inquiry she will be intitled to them (*a*). But if she have demanded her dower, then she ought to reply to the plea, stating that fact, and putting the question in dispute in issue.

If she omit to do so before suing writ of dower, the heir may plead *tout temps prist*,

But if the heir do not take advantage of the widow's neglect in demanding dower by a plea, he will lose the benefit of that circumstance (*b*); and in such event she will be intitled to mesne profits and damages from her husband's death, together with costs (*c*). But the widow's title is so highly favoured in law, that her demand of endowment, without an express refusal on the part of the tenant, will be sufficient to intitle her to damages and costs.

and he can only take advantage of the neglect by a plea.

If, therefore, the heir be an *infant* under guardianship, and the widow apply to him for her dower, although he be willing to comply with the request, but is prevented by his guardian, still his non-assignment under such circumstances will not defeat the widow's right to damages and costs; because he was the proper person to apply to for the assignment, and the widow did all that was required of her in making the request (*d*).

But if she make the demand, it is not necessary to her title to damages that there should be an express refusal.

The alienee of the heir cannot plead *tout temps prist*, because he was not in the possession of the estate during all the period which elapsed since the husband's death, and therefore had not the power of assigning dower at all times during the whole of that period.

The heir's alienee cannot plead *tout temps prist*.

(*a*) Barnes, 234. Bull. N. P. 117. 1 Rich. Pract. C. P. 509. (*b*) Dobson v. Dobson. Kent v. Kent, *ub. supra*. (*c*) Bull, N. P. 117. (*d*) Corsellis v. Corsellis, Bull. N. P. 117.

Acceptance of dower a bar to damages.

Since damages for detention of dower are only given, as we have seen, by the statute of *Merton*, when an assignment of dower cannot be procured *sine placito*, it necessarily follows, that if the widow accept her dower from the heir or his alienee, she will lose her damages and costs (*a*).

Plea of detention of charters.

With respect to the plea that the widow detains the title deeds of the estate, such a plea ought also to contain an averment that the heir has been always ready to render dower in case the widow would deliver them to him. If the widow, in her replication to such a plea, admit that she has the deeds, and offer to deliver them to the heir, and bring them into Court, she will obtain an immediate judgment for her dower, because the plea admits her right to endowment, upon condition of her yielding up the deeds (*b*); but she will lose mesne profits, damages, and costs, since it was her own fault, by improperly detaining the deeds, that her dower was not assigned (*c*). And if she deny the fact of detaining any of the deeds, and the issue is found against her, she loses her dower (*d*).

Effect of widow's admission.

She will lose mesne profits, damages, and costs.

If she deny the detention, and the fact be found against her, dower is forfeited.

This plea lies in privity only, viz. for the heir of the husband; so that an alienee, who is a stranger, although he may be intitled to the documents, cannot plead the detention of them by the widow as an excuse for not rendering her dower (*e*).

This plea lies only for the heir.

Its form.

The heir must show in his plea the withholden deeds in certainty and with precision, in order that issue may be taken upon the fact of the detention of them. This certainty must be such as would support an action of *detinue* for the deeds, as a general description with an averment that they are in a box or chest locked up or sealed (*f*); but if the box or

---

(*a*) Co. Litt. 33, *a*. (*b*) 9 Rep. 18, 19. 1 Salk. 252. (*c*) Co. Litt. 32, *b*. (*d*) Hob. 199. (*e*) Cro. Eliz. 367. 9 Rep. 18. And hence it seems that a devisee cannot plead detinue of charters, Dyer, 230, *a*. (*f*) Dyer, 230, *a*. pl. 52. 9 Rep. 18.

chest be open, each deed ought to be particularly described (*a*).

When the heir is excluded from this plea.

There are instances, however, in which the heir will be excluded from this plea. Thus, if he do not claim the lands by descent, but by *purchase*; or if he delivered the deeds to the widow, which was his own voluntary act (*b*); or if he, not being tenant of the freehold, be vouched by such tenant, he cannot plead detention of charters (*c*). In the last case of the heir vouchee it is observable, that he, not being tenant of the freehold, was not intitled to the deeds (*d*), consequently he had no ground of complaint for the non-delivery of them; besides, he is unable to aver in his plea in contradiction to the tenant's freehold, that he has always been ready to render dower from the husband's death, if the widow would have delivered up the deeds; an averment, as it has been noticed, essential to the validity of the form of such a plea (*e*). Again,

The detained deeds must relate to the dowable lands, in order to deprive the widow of her dower and damages.

It seems that the charters detained must relate to the lands of which the widow claims dower (*f*), and the plea of detention of them can only avail the heir as to the lands comprised in them; so that if the widow be dowable out of other lands, and have demanded her dower, the plea of detention of charters will not deprive her of mesne profits and damages, nor of her dower in the property not included in them.

But he need not to have the sole interest in the deeds.

Although, as it has been observed, the heir must

(*a*) 1 Bro. "Dower," fo. 254 *b*. pl. 57. Dyer, 230 *a*. (*b*) 9 Rep. 18. Perk. sect. 355, 356. (*c*) Dyer, 230, *a*. Perk. sect. 357, 358. (*d*) Ibid. sect. 358. (*e*) This must be understood as applying to cases where the charters detained do not relate to lands descended to the heir in the same county, or where the heir came in as second vouchee, for where the heir was vouched immediately by the tenant, and had assets by descent in the same county, he might plead detinue of charters, that is (as it seems) detinue of the charters belonging to the lands descended to him. See 9 Co. 18, 19. (*f*) Perk. sect. 356, 357. 9 Rep. 17 *b*.

have a right to the possession of the deeds, in order to plead the detention of them in excuse for his not assigning dower: yet if they relate to the dowable estate descended upon him, and he be tenant of the freehold, it is not necessary that he should have the sole and only interest in them.

Accordingly, two coparceners of lands make partition, and then their mother, a widow, brings a writ of dower against one of them; the tenant may plead the demandant's detention of the deeds relating to the lands, although such documents concern as well the inheritance of her sister as her own, and in which, therefore, the sister has an equal interest (*a*).

Yet his interest in them must be absolute and indefeasible.

If, however, the heir's title to the deeds be not absolute, but liable to be defeated by the birth of a child, the heir cannot plead the widow's detention of charters in excuse for withholding her dower; because the widow may say she does not detain them wrongfully, but for the use of the child, *en ventre sa mère*.

Thus, if the heir be the husband's brother, and the widow is left *enseint* by her husband, the brother will be excluded from this plea (*b*), because his title as heir may be defeated by the birth of a child. And it is said by *Perkins*, that the detainer of the *transcript* of a fine from the heir by the widow, is not a sufficient cause to detain from her her dower (*c*).

Whether detaining the transcript of a fine will justify withholding of dower.

[Formerly if the writ of dower was brought against a guardian in chivalry, he might plead that the widow detained the body of the heir from him (*d*).]

2. The difficulties and hazards to which the widow is exposed in proceeding at law for the recovery of her dower, and its incident mesne profits, damages, and costs, are so numerous, as it appears from what has

---

(*a*) Perk. sect. 359. (*b*) 1 Br. "Dower," fo. 252 *b*. pl. 8. (*c*) Perk. sect. 360. *contra*, 9 Vin. Ab. 236, pl. 2. (*d*) Co. Litt. 39 *a*. Perk. 361. 9 Co. 19. Hob. 199.

been said, that widows have preferred resorting to a Court of Equity for assignment of dower, in which there are fewer embarrassments from forms of proceeding than at law, and where all obstacles are removed which improperly tend to delay or defeat their rights. It would be practically useless to attempt to trace out the times when, and the steps by which a Court of Equity established a concurrent jurisdiction with Courts of Law upon this subject; suffice it to say, that the jurisdiction of a Court of Equity is now firmly settled in these cases. The principle is intelligible and reasonable, viz. that the widow labours under so many disadvantages at law from the embarrassment of trust terms, &c., and from an ignorance of the titles, values, and quantities of the lands of which her husband was seised, that she is intitled and ought to have every assistance that a Court of Equity can give her, not only in paving the way to establish her right at law, but also by giving complete relief when the right is ascertained (*a*).

Jurisdiction of Equity in suits for dower.

Accordingly, in *Mundy* v. *Mundy* (*b*), the widow filed a bill for dower, without charging in it any impediment to her obtaining an endowment at law. The defendant demurred to the bill for a want of equity, the widow's remedy (if any) being at law; but the demurrer was over-ruled by *Lord Rosslyn*; who observed, that where the title to dower is admitted, and nothing to be done but to assign it, since there remained nothing to try, it would be useless to send the matter to a Court of Law.

The widow's title to dower is merely a legal right; and it appears from the principle before stated, upon

---

(*a*) Curtis v. Curtis, 2 Bro. C. C. 634. (*b*) 4 Bro. C. C. 294. See also Mitf. Plead. 109. 2 Ves. jun. 122, S. C. A similar decision was made by Lord Talbot in Moor v. Black, Forrest, 126.

which a Court of Equity entertains jurisdiction to give complete relief, that it does so in order to remove obstacles in the widow's way, at law, to obtain an assignment of dower. For this reason it is usual for the widow to insert a general charge in her bill of outstanding terms, &c., which the heir or tenant intends to set up to defeat her legal proceedings, and prudence seems to require that this practice should not be forsaken (*a*).

When the widow's title is doubtful, the Court orders her to bring a writ of dower, retaining her bill, &c.

In consequence of the widow's title being purely legal, when any question of dower has arisen in a Court of Equity, and doubts have been entertained of the widow's title, it has been the constant practice to put her to bring a writ of dower (*b*); the Court retaining the bill in the mean time, but assisting her in trying her right, and deriving the full benefit of it, when it is determined at law in her favour, viz. by giving her a discovery of deeds (*c*), in ascertaining metes and bounds (*d*), and in giving her possession according to her right (*e*).

Upon the principle of the widow prosecuting a mere

(*a*) 2 Ves. jun. 124. 3 Atk. 130. (*b*) 2 Sch. and Lef. 391. 2 Bro. C. C. 620. 2 Ves. jun. 128. But this rule does not appear to be imperative, in cases where the title can be tried in a more convenient mode. In a recent instance, the right depending on a question of law, a case was directed. But where the marriage is disputed, as in Curtis v. Curtis, 2 Bro. C. C. 620, a writ of dower seems to be necessary, as the question must regularly be tried by the Bishop's certificate, which it seems can only be obtained through the medium of a writ issued for that purpose, from a Court in which an action of dower is pending. (*c*) 2 Bro. C. C. 631. (*d*) 3 Atk. 130. (*e*) A commission usually issues to set out and assign the dower, Wild v. Wells, 1 Dick. 3. Lucas v. Calcraft, 2 Dick. 594, 1 Bro. C. C. 134. Worgan v. Ryder, 1 Ves. and B. 20. Reg. Lib. B. 1812, fo. 96. See 2 Ves. jun. 125. But the decree sometimes directs the Master to assign the dower. Goodenough v. Goodenough, 2 Dick. 795. Reg. Lib. A. 1771, fo. 557. See the form of such a decree in Vanheythuysen's Equity Draftsman, p. 656.

legal demand in equity, that demand, it would seem, can only be resisted by a *legal* defence.

Whether plea of purchase for value is a defence to a bill for dower.

Thus it was decided in *Williams* v. *Lambe* (*a*), that a widow, who filed her bill for dower against the purchaser of the lands from her husband during the marriage, praying a discovery of them, and an assignment of dower, could not be defeated of either by a plea, that the tenant was a purchaser for a valuable consideration without notice.

The last decision, though quarrelled with, is, as it would seem, sound and proper; for when it is admitted that dower is a mere legal right, and that Courts of Equity in assuming a concurrent jurisdiction with Courts of Law, professedly act upon the legal right, those Courts, in analogy to law, where such a plea would not be looked at, decide that in this instance the same equitable plea is also inadmissible (*b*). This analogy, it is obvious, does not hold when the widow

---

(*a*) 3 Bro. C. C. 264. (*b*) A similar rule was acted on in Rogers v. Seale, 2 Freem. 84. 2 Eq. Ca. Ab. 70; and see 1 Ball and B. 171. But the principle that Equity will not interfere against a purchaser for valuable consideration without notice is commonly laid down in general terms without reference to the nature of the plaintiff's title: and in Walwyn v. Lee, 9 Ves. 24, 33. The Lord Chancellor held a plea of purchase good to a Bill for discovery and relief, founded on a legal title. See to the same effect Jerrard v. Saunders, 2 Ves. jun. 454. Parker v. Blythmore, Prec. in. Ch. 58. 2 Eq. Ca. Ab. 79. Robinson v. Haynes, Gilb. Eq. Rep. 184. And it seems to be clear that a plea of purchase is a good defence to a Bill of discovery, though the plaintiff's title be legal. Burlace v. Cooke, 2 Freem. 24. 2 Eq. Ca. Ab. 681. Abery v. Jones, 1 Vern. 27. Bishop of Worcester v. Parker, 2 Vern. 255. Hoare v. Parker, 1 Cox, 224. 1 Bro. C. C. 578. So according to some authorities (1 Vern. 354. 2 Vern. 159. 2 Ves. jun. 458) a Bill to perpetuate testimony, which is generally founded on a legal title, will not lie against a purchaser for valuable consideration without notice, and the Lord Chancellor in intimating a contrary opinion, stated as the ground of it, that such a Bill calls for no discovery from the defendant, but merely prays to secure the testimony. See 6 Ves. 263.

applies for *equitable* relief, as the removal of terms, &c. In such cases, the equitable plea of being a purchaser for value without notice, cannot, as it would seem, be resisted (*a*). In the first case, the widow, proceeding upon the concurrent jurisdiction of the Court, merely inforces a right which the defendant cannot at law resist by such a mode of defence; in the second case, she applies to the equity of the Court to take away from him a defence which at law would protect him against her demand.

Account of mesne profits decreed from husband's death.

We have seen that at law, *mesne* profits under the term damages, in the statute of *Merton*, were lost by the death of either the plaintiff or defendant, before they were assessed and ascertained (*b*). But it is not so in equity. That Court has been more liberal to the widow, from the consideration that the profits of a third part of her husband's real estates are her only subsistence from his death. It is, therefore, the course of the Court to assign to her dower, and universally to give her an account of mesne profits, from the death of her husband, and not to permit her title to them to be defeated by the death of the tenant *pendente lite*; upon the principle that it would be unjust if the heir's denial of her right to dower, and the accident of his death before the establishment of it, should be allowed to place her in a worse situation than if he had thrown no impediment in her way, and fairly and candidly admitted her claim (*c*).

Although defendant die *pendente lite*.

The plea in Williams v. Lambe, was perhaps open to another objection. The defendant stated himself to have purchased, without being aware that the vendor was married. But it seems doubtful whether a person purchasing of one seised in fee, without inquiring whether the vendor be married, can avail himself of want of notice of that fact. See Sugden, Vend. and Purch. p. 649, and Kelsall v. Bennet, 1 Atk. 522.

(*a*) See 2 Sch. and Lef. 390. (*b*) *Supra*, p. 442.
(*c*) Curtis v. Curtis, 2 Bro. C. C. 620.

Statute of limitations no bar either at law or in equity.

This being so, the length of time which may have elapsed since the husband's death, although it may have exceeded *six* years prior to the bill being filed, will not narrow the rule, nor confine the account to the last six years preceding the exhibition of such bill, in analogy to the statute of limitations; for since at law mesne profits, as damages under the statute of *Merton*, are given without restriction as to time, the like account is decreed in equity.

Accordingly, in *Oliver* v. *Richardson* (*a*), the widow filed a bill for dower, and an account of the arrears after a lapse of *twelve* years from the death of her husband. The question was, from what period she was intitled to the account? And *Sir William Grant*, M. R., decreed the account from her husband's death, observing that she was *prima facie* intitled from the time her right to endowment accrued, and that some reason must be shown by the defendant, why his Honour should limit the account; for why, said he, should the widow be deprived in that Court of the account from her husband's death, if she were not barred at law?

Semble, that widow is intitled in equity to mesne profits although she did not demand dower before bill filed, and although her husband did not die seised.

It has been said that *mesne* profits will be decreed to the widow in equity in instances only where she has demanded dower in analogy to the rule of law, and the construction of the statute of *Merton*, before considered (*b*); and a case of *Delver* v. *Hunter* (*c*), has been cited to that effect; as also to prove that there shall be no mesne profits decreed except where the husband *dies seised* of the lands as required by the same statute (*d*). This doctrine, however, seems, to be open to objection; for it is presumed that Courts of Equity do not in this instance proceed either upon the statute of *Merton*, or with reference to any legal rule in de-

---

(*a*) 9 Ves. 222. (*b*) *Supra*, p. 445. (*c*) Bunb. 57.
(*d*) *Supra*, p. 437.

creeing to the widow *mesne* profits; the principle which they adopt appears to be the *title* of the widow to endowment immediately upon the death of her husband; this right drawing to it an account of the profits of her share received by the person whose duty it was to have assigned dower, so that such person incurs a debt to the widow which he in his lifetime, or his representative after his death, is considered in equity as liable to discharge. In addition to this it may be remarked that the tenant may probably be considered in equity as holding the widow's one-third of the estate, as her trustee or bailiff, from the death of her husband, and therefore answerable to her for his receipt of rents in respect of that proportion of the property. Under all the circumstances, and the favourable disposition of Courts of Equity to extend the rights of the widow beyond her title at law (*a*), it is conceived, notwithstanding the case of *Delver* v. *Hunter*, (reported in a book of little authority, and said by *Lord Mansfield* (*b*) to consist of very loose notes, and never intended to be published) that in respect to mesne profits in dower, the widow's right to an account of them in equity may be enforced either against the heir or alienee, or their representatives, without regard to any previous demand by the widow for endowment, or to the circumstance whether her husband died seised or not; the title to mesne profits being inseparably attached to the right of endowment of one-third part of the estate (*c*).

(*a*) 2 Bro. C. C. 629. (*b*) 5 Burr. 2658. (*c*) The remarks attributed to Lord Hardwicke in 3 Atk. 130, and those of Lord Alvanley in Curtis v. Curtis, 2 Bro. C. C. 628, imply that a dowress may have a larger relief, in respect of mesne profits, in equity than at law. But the passage in Atkins is, as observed in 2 Bro. C. C. 633, founded on a misconception of the right to damages at law. And the decision in the case of Curtis v. Curtis, turned only upon the ordinary principle of equity, that the decree is to be made according to the rights of the parties as they exist at

And a formal assignment of dower is unnecessary to intitle her to mesne profits.

Upon the same principle of title to endowment, the circumstance of an assignment of dower not having been made prior to the widow's death will not deprive her representative of mesne profits (*a*), nor prevent her right whilst living to obtain payment of them in equity. The want of a formal assignment of dower, said *Lord Cowper* in *Hamilton* v. *Mohun* (*b*), is nothing in equity, since the widow's right in *conscience* is the same as if it had been made. His Lordship, therefore, in that case decreed to the widow in a suit instituted against her by the heir for an account of the profits of the dowable estate in which she had been in possession as his guardian, an allowance of one-third of them in respect of her right to dower.

That case was followed by *Lord Hardwicke* in *Graham* v. *Graham* (*c*), a case in which the widow was the plaintiff, who being a trustee of the dowable estate for her son, and having received the profits, and therefore accountable to him for them, claimed an allowance for her dower in rendering those accounts; and his Lordship not only allowed to her the amount of the arrears, but also secured to her the future payment of her dower.

---

the institution of the suit: the death of the parties during the suit did not therefore alter the right; and on this ground Lord Alvanley distinguished the case, from that of the heir dying before the filing of the Bill, 2 Bro. C. C. 632. In Mundy v. Mundy, 2 Ves. jun. 122. 4 Bro. C. C. 294, one of the questions made was whether the widow was intitled in equity to the arrears, where the heir had always been willing to assign her dower. Lord Redesdale treats the right to arrears in equity, as being the same as at law, observing that Courts of Equity in assigning dower consider themselves to be proceeding merely on a right, which may be asserted in a Court of common law, p. 98, 3d ed. And upon the same principle, Courts of Equity in deciding on the costs of suits for dower, have professed to be guided by analogy to the rules prevailing at law. See the next note.

(*a*) See 1 Fonbl. Treat. on Equity, 22. (*b*) 1 P. Will. 122. (*c*) 1 Ves. sen. 262.

Costs of suit, when and when not to be paid by the heir.

With respect to *costs*, they are in the discretion of the Court, and that discretion is regulated by the conduct of the parties.

Thus, when the widow's suit is for the single purpose of obtaining an assignment of dower, and there is no misconduct on the part of the defendant, she will not be intitled to costs (*a*).

If, however, the defendant's opposition be vexatious, or if he fraudulently withhold her dower, he will be saddled with the costs of the suit (*b*).

When widow intitled to a separate report of the arrears of her dower.

In consideration of the widow requiring the profits of her dower for immediate support, if her claim form an ingredient only in the suit, and several matters are referred to a Master to inquire into and make a *general* report, the Court will not delay the payment of arrears of the widow's dower until the general report is made, but it will direct the Master to make an immediate separate report of what is due to her for arrears, in order that she may receive them for her maintenance. This was accordingly done in *Eccleston* v. *Berkley* (*c*), where an account was directed to the Master in regard to several incumbrances made by the husband *after* the marriage upon the dowable estate; *Lord Hardwicke* upon the application of the widow directed the Master to make a separate report of what was due to her in

---

(*a*) Lucas v. Calcraft, 1 Bro. C. C. 134. 2 Dick. 594. Mitf. Pl. 98, 3d ed. 2 Bro. C. C. 632. The reason assigned for not giving costs in suits for dower, viz. that no costs are given on writs of dower, is not quite satisfactory; for though it be true that a dowress is not intitled to costs in a writ of right of dower, yet it has been seen that in the ordinary form of proceeding, by writ of dower *unde nil habet*, she recovers costs whenever she is intitled to the mesne profits or damages. In the authorities mentioned above, and in Mundy v. Mundy, 2 Ves. jun. 128, it seems to have been considered that in general no costs are given to the dowress at law, unless an actual deforcement be proved. But see ante, p. 440.

(*b*) Worgan v. Ryder, 1 Ves. and Bea. 20. Outhwaite v. Outhwaite. Beames on Costs, 36. (*c*) Ridgw. Ca. temp. Hardw. 253.

respect of dower, she being intitled to one-third of the rents, paramount the claims of the incumbrancers.

And as to her title to interest upon those arrears.

It must, however, be noticed that it is the general rule of the Court not to allow interest upon arrears of dower. The rule is considered to be so absolute, as to render it doubtful, whether it will be relaxed in the most distressing cases (*a*); yet I have found no case to that effect, no authority pronouncing that a widow under *no* circumstances shall receive interest upon the money arising from her dower, improperly detained from her by the person who ought to have assigned it. If such were the rule in equity, the widow would be in a worse situation in that Court than if she had brought her writ of dower at law; for we have seen that a jury in assessing damages *pro detentione dotis* are at liberty to give her more than one-third of the by-gone annual value of the estate, if she have suffered injury to a larger amount in consequence of the non-assignment of her dower (*b*). Now one species of damage the widow might suffer may arise from the payment of interest upon money borrowed for maintenance whilst contending for her right to dower; this payment of interest, it is presumed, would be an injury which a jury would feel no difficulty in considering in their estimate of damages for the detention of dower; and it would seem singular if a Court of Equity, professing to favour the widow's claims, and upon that principle to extend to her relief even beyond what she could obtain at law (*c*), should refuse to give her the same relief which she might have had in a Court of common law. But it may be said that a Court of Equity declines to give interest in this instance in analogy to its

---

(*a*) See Ferrers v. Ferrers, Forest. 2. Batten v. Earnley, 2 P. Will. 163. Robinson v. Cumming, 2 Atk. 411. Newman v. Auling, 3 Atk. 579. Bedford v. Coke, cited 2 Ves. jun. 166. Lindsay v. Gibbon, cited 3 Bro. C. C. 495. (*b*) *Supra*, p. 440. 1 Leon. 56. (*c*) 2 Bro. C. C. 629.

practice in refusing interest upon arrears of annuities, and of such even, as are granted by way of jointure in bar of dower. The analogy, however, does not seem to be applicable in this instance, because these annuities are created by *express contract* among the parties in solemn instruments, and they might, if they thought proper, have provided for the payment of interest upon the arrears of the annuities granted, to which transactions the observation of *Lord Thurlow* in *Tew* v. the *Earl* of *Winterton* (*a*) applies, viz. "that the Court has never given interest but where there has been some ground from whence it could gather that there was a *contract* between the parties that interest should be paid." This remark can only apply to instances where there is a possibility of such a contract being made; or to cases where annuities are given by deed or will, in which provision might be made for payment of interest upon arrears (*b*), and not to a case like the present, where the widow's title is created by *law*; moreover it could not mean, that in such a case the deforceor of the widow's dower should be in a better condition in equity than at law, as he would be, as it has been before shown, if the interest paid by the widow for money borrowed to support her till she obtained her dower, should not be repaid her in equity in the shape of interest upon the arrears due in respect of such dower. The cases in which interest has been refused were chiefly of annuities, for the payment of interest upon the arrears of which provision might have been made. And even in these instances *Lord Hardwicke* expressed an opinion in an *anonymous* case reported by the elder *Vesey* (*c*), that "interest upon arrears might be given in a special case, as the being

---

(*a*) 3 Bro. C. C. 495. 1 Ves. jun. 451. (*b*) Mellish v. Mellish, 14 Ves. 516. (*c*) 2 Ves. sen. 662. See 2 Ves. jun. 167.

obliged to borrow money and to pay interest for it, and then, said his Lordship, the Court will give interest from a reasonable time." Upon the whole it is submitted as a reasonable presumption, and as being in analogy to law and not inconsistent with the decisions in equity, that interest will not be given upon arrears of dower except under special circumstances, one of which is where the widow has been under the necessity of taking up money at interest for her maintenance whilst her dower was with-holden (*a*).

(*a*) In the old cases much diversity of practice prevailed upon the question whether interest on arrears should be allowed. "The result (as Lord Redesdale observes) has been to refuse interest, except under very particular circumstances, and though it seemed to be the justice of these cases to give interest, it has been found the wisest way not to do so, as the principle might be extended so far as to become highly mischievous, and tend to create litigation in every case, and to encourage creditors to delay the prosecution of their suits." Anderson v. Dwyer, 1 Sch. and Lef. 303. The cases have not furnished any precise rules for ascertaining what special circumstances will be sufficient to warrant a departure from the general rule. Long delay occasioned by the misconduct of the defendant would perhaps form a ground of distinction. See Burton v. Todd, 1 Swan, 255. But it seems probable that in cases of this sort, the Courts would not at this day make an exception, founded solely on the pecuniary circumstances of the party to whom the arrears are due. In Tew v. Winterton, Lord Thurlow observes: "Poverty, compassion, &c. have been the reasons which have influenced the Court, according to the printed cases, which are so indistinct, that I cannot decide upon those principles. I should be very sorry to give as my reason for doing it, that she was in distress, or had borrowed money, &c."

CHAPTER X.

ON THE PREVENTION OF DOWER BY JOINTURES.

HAVING in the last chapter traced the widow's title to dower through its various stages until she clothed it with possession through the medium of a Court of Law or a Court of Equity; the only subjects which remain for consideration are, how that right may be prevented from ever attaching, and how it may be barred or forfeited, when the title once commences. These matters will be treated upon in this and the two following chapters, confining the consideration of the law of jointures, as being the methods most usually adopted for preventing dower, to the present chapter, the subject of which will be considered under the following sections:

I. *Legal jointures.*
II. *Equitable jointures.*
III. *The jurisdiction of Courts of Equity in assisting and relieving jointresses. Under which section are considered,*
    1. *Contracts and covenants to settle jointures.*
    2. *Jointures made under powers.*
IV. *The performance and satisfaction of covenants to make jointures.*
    1. *Of the performance of such covenants.*
    2. *Of the satisfaction of them.*
V. *The wife's interest in her estate in jointure, and the incidents, privileges, and powers belonging to it.*
    1. *As to her interest.*
    2. *Of her absolute alienation of her jointure*

with her husband, or merely to secure his debts, and

3. *Of the bar or forfeiture of her jointure.*

I. Legal jointures.

Jointures under the statute of Henry VIII.

The rule of the common law, that the widow's acceptance of a collateral satisfaction of, or out of lands in which she was not dowable, was no bar to her title to dower in those to which that title attached (*a*), united with the inconvenience which would have ensued after the passing of the statute of uses (*b*), induced the legislature by that act to enable the husband to bar effectually his wife's right to dower, by making a provision for her *before* marriage in lieu of it, and which is known by the name of her jointure. What the inconvenience would have been if it had not been obviated, the reader will understand from the following observations (*c*):

At the period of passing the statute, the greatest part of the lands in *England* was vested in feoffees *to uses*. Now since a widow was not intitled to dower of an *use*, her father or friends, upon her marriage, procured a settlement to be made of some particular lands of the intended husband to his and his wife's *use*, in jointtenancy for their lives, as a provision for her in the event of her surviving him. But the statute removed the partition between the *possession* in the feoffees, and

---

(*a*) Co. Litt. 36 *b*. See last chapter, sect. 3, p. 402. (*b*) 27 Hen. 8. c. 10, sect. 6. (*c*) These observations are to be understood as applying only to the legal right to dower. "If," (as Lord Mansfield remarks), "the statute of Hen. 8. had never been made, Courts of Equity would have given relief," 2 Eden. 74. Though a jointure could not, independently of the statute, be pleaded at law in bar to a writ of dower, it would, it seems, be binding on the wife in equity as an agreement, if made with her concurrence before marriage; and if made after the marriage, it would raise a case of election.

the *use* limited to the *cestuique uses*, in declaring that the latter should attract the former; so that the legal inheritance in the husband's estates not settled upon the marriage, no longer continued in the feoffees, but was instantaneously transferred by the operation of the act to the husband, the *cestuique use*. The unavoidable consequence of this would have been to intitle the widow to dower in all her husband's unsettled estates of inheritance, and at the same time she might have retained the lands which had been settled upon her in lieu of that right (*a*). To remedy this injustice, the statute enacted that where purchases or conveyances had been or should be made of any lands, tenements, or hereditaments, by, or to, or to the *use* of the husband and wife in tail, or to, or to the use of one of them in tail, or for their lives, or the life of the wife, for her jointure, *every woman* married, having such jointure made, should not claim, nor have any title to dower to the residue of the lands, &c., which at *any time* were her husband's, *by* whom she had the jointure.

Provisions in cases of eviction, and when jointures are made *after* marriage.

And it was provided, that if the wife was lawfully evicted out of all or any part of her jointure, or by her husband's *discontinuance*, she should be endowed out of the residue of his estate, of which she was dowable to the extent of the lands from which she was evicted: and that in the event of the jointure having been made *after* the marriage, except by act of parliament, liberty was given to her, upon surviving her husband, to elect between such jointure and her dower.

A legal jointure, what.

Upon this statute the modern legal jointure is founded. It is defined by *Lord Coke*, from the purview of the act, to be a competent (*b*) livelihood of free-

---

(*a*) See 4 Rep. 1 *b*, 2 *a*. Gilb. Uses, 147. (*b*) The statute does not prescribe any rule as to the amount of a jointure: according to its literal construction, the right to dower is barred, however inadequate the settlement may be. Hence Lord Northington says: "The estate which is to bar dower is of no defined value by the

hold to the wife of lands and tenements, to take effect in profit or possession, presently after the death of the husband, for the life of the wife at the least (*a*).

In the construction of this statute, Courts of Law have regulated their decisions upon the validity of jointures, in reference to the widow's title to dower in *lieu of* which jointures were substituted; so that as to time of commencement, certainty, interest, &c., they have required the jointure to be as beneficial to the widow as her dower. If this object be effected, it is indifferent in what manner the estate is limited to the wife; for although the statute expressly mentions these five forms of limitations only,—1st, limitations to the husband and wife, and to the heirs of the husband; 2d, to the husband and wife, and to the heirs of their two bodies; 3d, to the husband and wife, and to the heirs of the body of one of them; 4th, to the husband and wife for their lives; 5th, to the husband and wife, for the life of the wife; yet these particulars are only expressed as examples, and not in exclusion of other cases which may fall within the meaning and intention of the act. This is proved from the proviso in it, reserving to the widow her election between the jointure and her dower, when the provision is made *after* the mar-

---

statute, and if it be made up of the qualities and accidents specified, it is a legal bar, and every Court of Law is bound to accept it as such," 2 Eden. 57. Lord Coke, though he describes a jointure as a competent livelihood, &c. does not mention adequacy of amount in his enumeration of the points to be observed in making a perfect jointure within the statute, and does not allude to any criterion by which its competency is to be ascertained. It seems to be clear, that if the settlement be made before marriage with the consent of the wife, or if being made during the coverture, it is afterwards accepted by her, it cannot be objected to on the ground of inadequacy. The amount of the jointure will, therefore, not be material to its legal effect, except in cases where the wife was an infant at the time of the marriage, or where the jointure was made before marriage, without her assent. (*a*) Co. Litt. 36 *b*, 37..

Statute gives to the widow a right of election between dower and a jointure, when the latter was made *after* marriage.

riage. The clause declares, "that if any wife have, or hereafter shall have, any manors, &c., unto her given or assured after marriage, for term of her *life*, or *otherwise*, in jointure," &c.; hence it appears, that any interest limited to her, whether joint or separate, for life or in tail, equally beneficial with her dower, was within the contemplation of the statute, and will therefore be a good legal jointure within its provisions (*a*). These observations will be illustrated from the consideration of what have, and what have not been determined to be valid jointures at law.

1. The jointure must be limited so as necessarily to commence at the husband's death.

First, the jointure ought to take effect, in possession or profit, immediately from the death of the husband (*b*).

Accordingly, if an estate for life be limited to *A*, a stranger, after the husband's death, and then in jointure to the wife for life; or if the limitation had been to *A* for a term of years, after the decease of the husband, with remainder to the widow for life, in satisfaction of her dower by way of jointure; or if the remainder for life, limited to the wife for her jointure, was expectant upon an estate tail in her husband, these would not be good jointures within the meaning of the statute, which did not intend to place widows in a worse situation, in respect of those provisions, than they would have been in regard to their dower; and the death of *A*, or the expiration of the term, or the husband's death without issue, will not cure the original defects, for *quod ab initio non valet, tractu temporis non convalescet* (*c*). Again,

The mere possibility of the jointure of the wife taking

(*a*) Vernon's case, 4 Rep. 2. (*b*) This rule applies to the mode in which the jointure is to be limited. It seems that a jointure will not be rendered void, by an uncertainty as to its taking effect in possession, arising from the title to the property settled being defective. Corbet v. Corbet, 1 Sim v. Stu. 612. (*c*) Co. Litt. 36 *b*. 4 Rep. 2. Hob. 151. Wood v. Shurley, Cro. Jac. 489. Hut. 51. Winch. 33. Gilb. Uses, 148.

effect upon her husband's death, is insufficient, it must be so limited as to ensure that circumstance.

If, therefore, the limitation were to *A* for life, remainder to *B* for life, with remainder to such woman as *B* might marry, this would not be a good jointure upon the wife of *B*, because it is subject to the contingency of *B* dying before *A*, which event not happening, the widow of *B* would be unprovided for from the death of her husband so long as *A* lived (*a*).

It is obvious, from the above cases, that if the jointures were established under the statute, the widows might have been deprived of their dower without deriving any benefit from the provisions made in lieu of them, which would have been contrary to the intention of the act of parliament. But if there be a *mesne* estate in a sense intervening between the estate for life of the husband, and the remainder to the widow for her life as a jointure, yet if such mesne estate be concurrent with the husband's and cannot exceed it, then the interest limited to the widow will be a good jointure within the true intent and meaning of the statute.

But the usual limitation to the use of trustees during husband's life, to preserve, &c. will not invalidate a jointure.

Thus, if the limitations were to the husband for life, remainder to the use of trustees in the usual way, during the husband's life, to preserve contingent uses, with remainder to the wife for life in jointure, such a provision would be a valid jointure.

Second, the jointure will be valid whether it be limited to the widow *solely*, or to her and her husband in joint tenancy.

2. The jointure may be limited to the wife *solely* or to her and the husband *jointly*.

Accordingly, if the estate be limited to the husband and wife in fee simple, it will be a good jointure, although the limitation be not one of those mentioned in the statute (*b*); because such a provision is within its in-

---

(*a*) 1 Sid. 3—4. Winch, 33. Caruthers v. Caruthers, 4 Bro. C. C. 500. 513, See Corbett v. Corbett, 1 Sim. & Stu. 612.
(*b*) Dennis's case, Dyer, 248 *a*. 4 Rep. 3 *b*.

tention, for if she be the survivor, then she will have a larger interest than if the estate had been merely limited to her for life after her husband's death, and if she die before him, there is no occasion for the provision.

Semble, that a limitation to wife and a stranger in joint-tenancy would be a good legal jointure.

It has, indeed, been said, that if the limitation were to the husband for life, remainder to his wife and *A* for their lives, that would not be a good jointure (*a*), because the settlement not being to the wife *alone*, it is not a case mentioned in the statute (*b*). But such a decision does not appear satisfactory, since the widow has a freehold interest for her life to commence in certainty in possession and profit, immediately upon her husband's death, with a contingency in the event of her surviving *A*, of becoming beneficially possessed of the whole estate; so that this provision may be greatly to the widow's advantage. And with respect to the case not being mentioned in the statute, it has been before observed, that the act extends to cases not enumerated in it. For these reasons, it is presumed that such a provision would be a good jointure, notwithstanding the decision in *Winch* (*c*), referred to in support of the contrary opinion, for that case appears to have been decided upon the principle, that the jointure might not have commenced at the husband's death, since his father, the settlor, who reserved to himself an estate for life, might have survived his son.

3. The estate in jointure must be such as may continue for the widow's life.

Third, the estate limited to the widow ought to be such a freehold as shall at the least continue during her life, except it be determined sooner by her own act.

Hence an estate settled upon the wife *pur autre vie*, or during the lives of three or more persons (*d*), is not a good jointure within the statute; because she may survive all of them, in which event she would be unprovided

---

(*a*) Winch, 33. (*b*) 3 Bac. Abr. "Jointures," (B) 713.
(*c*) P. 33. (*d*) 4 Rep. 2 *b*. Co. Litt. 36 *b*.

for; so that this is a case not within the contemplation of the act.

If, however, the continuance of the widow's estate during her life be made to depend upon herself, viz. her remaining single, or her performance or non-performance of certain conditions; such a qualified or conditional freehold will, as it seems, be a good legal jointure, and bar her of her dower, whether she determine her estate or not; for the jointure, in its creation, being a freehold, and which might continue for her life, is within the letter and the intention of the statute; and the circumstance of its being made defeasible at the election of the widow does not take the case out of the act. The statute, therefore, giving validity to such provisions in bar of dower, distinguishes them from assignments of dower at common law, in lieu of which they are given, for it has been shown that assignments by the heir of common right, with conditions annexed to them, were invalid (*a*).

But it will be no objection that it may be sooner determined by the act or at the election of the widow.

If, then, the jointure be limited to the wife after the death of her husband *durante viduitate*, or upon condition that she perform her husband's will, &c. such limitations made in lieu of dower will be good legal jointures (*b*).

So that an estate *durante viduitate* may be a good jointure.

(*a*) Chap. 9. sect. 3. p. 401.

(*b*) Vernon's Case, 4 Co. 3 *a*. Dyer, 317 *a*. But it is doubtful whether it was intended to be decided, that an estate thus qualified would universally constitute a good legal jointure. The case related to a jointure made after marriage, and the chief reason given for the decision was, that the widow had accepted it, and that if the condition had been unreasonable, she might have waived it: and it does not seem to have been thought that a jointure subject to a condition would be good unless accepted. See Cro. Eliz. 452. Gilb. Uses, 148. This reasoning does not apply to antenuptial jointures, which are not waivable, and do not derive their effect from the acceptance of the widow. The 9th section of the statute which applies to jointures made after marriage, may admit of a larger construction than the 6th, with reference to the nature of the estate to be limited to the wife: it speaks of lands assured to the wife, "for the term of her

But not for a term of years.

But if the estate settled in jointure be of a nature less than freehold, as of a term for years, then although the term from its length must necessarily exceed the life of the widow, it will not be a legal jointure within the provisions of the statute, because it is but a *chattel* interest, and less in the eye of the law than a freehold for the wife's life (*a*); besides an assignment of dower for a term of years would not be, as has been before noticed, a valid assignment (*b*).

The circumstance when the jointures are made *after* the marriage must not be forgotten, since, although such jointures are not absolute bars of dower, as they are when made previously to the coverture, yet they are so *conditionally*, *i. e.* if the widows enter and accept of them; this right of election being expressly reserved to the widows by the statute, when the jointures are made subsequently to their marriages. The legislature having by this reservation guarded the wife against the influence of her husband which he is supposed to have over her during the marriage, and afforded her the liberty of accepting his provision or her dower of common right after his death, when such influence is considered to have determined. So that,

4. Jointures must be made *before* marriage to be absolutely binding on the wife. If *after* marriage they are voidable.

Fourth, the jointure must be made *before* the marriage in order to be a complete and irrevocable bar to dower (*c*).

Still if it be made after marriage either by deed or will (*d*), it will be a jointure within the statute, if made according to the directions of that act, but it is *voidable* by the widow after her husband's death, at her election (*e*).

---

life, *or otherwise*, in jointure." One of the reasons for the decision in Vernon's Case was, that the jointure in question came within these words. Dyer, 317 *b*. 4 Co. 3.

(*a*) Co. Litt. 36 *b*. (*b*) Chap. 9. sect. 3. (*c*) Co. Litt. 36 *b*. (*d*) 4 Co. 4. (*e*) Co. Litt. 36 *b*.

If, therefore, she enter upon the lands so settled, and receive the rents, that will be a confirmation of the jointure, and a bar to dower (*a*). And if she, by writ of dower, waive her jointure, she will at law be confined to such her title, and not be permitted to claim both dower and jointure (*b*). Acts of confirmation.

In *Vernon's* case (*c*) the jointure was settled, after the marriage, to the use of the husband for life, remainder to the wife for life, upon condition that she performed her husband's will. The widow entered upon the lands in jointure after her husband's death, and agreed to the provision; and the Court determined that she was barred of her dower by acceptance of the provision in lieu of it.

And in *Tracy* v. *Ivies* (*d*), lands were limited by the husband to the use of himself and his *then* wife in fee simple, with a condition that if she were the survivor she should pay such sums of money, not exceeding 200*l*, as he should appoint by his will. He made the appointment, and devised the residue of his lands to strangers, and died. His widow and her second husband brought a writ of dower against the devisees, who *averred* that the settlement was made for the widow's jointure; but no *other* matter having been proved, *i. e.* as it is presumed, the widow's entry and acceptance of the provision after the death of her husband not having been given in evidence, she obtained judgment for her dower.

In neither of these cases was the provision for the wife expressed in the deeds to be in lieu or satisfaction of her dower, but the Courts considered that the omission might be remedied by an *averment* and *proof*

(*a*) 3 Rep. 26 *a*. and *b*. 3 Leon. 271. Dyer, 220. 4 Rep. 4.
(*b*) Sharp v. Purslow, cited 4 Rep. 4 *b*, and 5. Gosling v. Warburton, Cro. Eliz. 128.
(*c*) 4 Rep. 1 Dyer, 317, pl. 7.
(*d*) 1 Leon. 311.

of that fact. This subject will be more fully considered under the next title.

The jurisdiction of Courts of Law to compel widows to elect between jointures made after marriage and dower.

The jurisdiction of a Court of Law to confine the widow to one of two benefits she was intitled to, seems to be founded upon the statute of *Henry* the eighth; for before that act, no rule of law was more clearly settled, than that a freehold title or interest could not be barred by a collateral satisfaction or recompense, but by the release or confirmation of the person intitled to it, or by an act of equal effect (*a*). Hence, a provision made for a married woman, by devise or otherwise, of lands or tenements in lieu or satisfaction of dower, would not at law oblige her to elect between either, but she would have been intitled to both (*b*); and it was immaterial whether the provision were made before or after the marriage. But since the statute of jointures, if the provision in satisfaction of dower be made *before* the coverture, and according to the requisites of the act, the jointure, as we have seen, will bar the wife's title to dower; but if the jointure be made *after* the marriage, then the same statute, as we have also seen, gives expressly to the widow after her husband's death, the privilege of electing between such provision and her legal right to dower. Courts of Law, therefore, are under the necessity of determining what acts of the widow shall be considered an election between her jointure and her dower. That statute, then, appears to be the foundation of the jurisdiction of those Courts to put the widow to an election between her dower and a legal jointure settled upon her after marriage. At present, however, if the provision, before or after the coverture, be so made as not to be a jointure within the act, a Court of Law cannot oblige the widow to elect between such provision and her

No jurisdiction unless the jointure be within the stat. of Hen. VIII.

(*a*) 4 Rep. 1 *b*. (*b*) Co. Litt. 36 *b*.

dower, but she will at law be intitled to both, because she was so intitled by the common law (*a*).

Fifth, The jointure must be made in satisfaction of the *whole* dower of the wife, and it ought to be so expressed in the instrument settling it (*b*).

5. The jointure must be expressed in satisfaction of dower. *Semble*, that a *parol* averment of that fact is inadmissible whether the jointure be by deed or will.

The necessity at law for the declaration in writing that the provision made for the wife is in satisfaction of her dower, arises from the passing of the statute of frauds and perjuries (*c*), which was subsequent to the two cases last stated, and also to an anonymous case in *Owen* (*d*), and to *Villers* v. *Beamont* (*e*), and other authorities, according to which, if the provision made for the wife by her husband was not expressed in the deed to be a jointure or in satisfaction of her dower, that circumstance might be shown by an averment supported by *parol* evidence. It is, however, presumed that these cases, so far as they relate to this matter, are superseded by the above statute, which declares that no estates or interests of freehold, &c. shall be surrendered, &c. unless by deed or note in writing, &c.: if, then, oral testimony were admissible to add to the instrument by such evidence what is not expressed in it, viz. that the provision for the wife was intended as a jointure; the effect would be to allow a surrender of her freehold title to dower by *parol*, when the statute requires such surrender to be made in writing. I have found one case since the passing of the act which establishes the necessity of the deed expressing that the provision contained in it for the wife should be in satisfaction of her dower.

A bill was brought for dower against the heir, who insisted that the husband had given a bond in trust to

---

(*a*) 4 Rep. 2 *b*. (*b*) Or the intention to make a provision in bar of dower must appear by necessary implication from the contents of the instrument. See *post*, sect. 2. (*c*) 29 Char. 2. c. 3. (*d*) P. 33. (*e*) Dyer, 146, pl. 68.

secure to his wife, the plaintiff, 400*l*, in case she survived him; the heir also alleged that this provision was, at the time it was made, intended to be in lieu of dower, and that the wife acknowledged it to be so, *which he offered to prove.* But *Lord Hardwicke* was of opinion that this *parol* evidence could not be received, since it was within the statute of frauds and perjuries; and he said that a *general* provision for a wife was not a bar of dower *unless it was expressed to be so* (*a*).

The observations which have been made as to deeds, equally apply to dispositions of lands made by the husband for his wife by *will.* Before the statute of frauds and perjuries, it was decided that if the will did not declare the devise to the wife to be a jointure, or in lieu of her dower, the omission could not be supplied by an averment to that effect; because, from the nature of the instrument, the devise imported a bounty, a voluntary gift, so that if an averment were admitted to show that the testator intended the testamentary disposition to be a jointure, it would be inconsistent with the instrument itself (*b*). That reason was rendered more conclusive by the above statute, which not only declares that all devises of lands, &c. shall be in writing, but shall be signed by the party, &c. in the manner and with the solemnities mentioned in it; consequently no averment can be made, except upon the words contained in the will; besides, if evidence were admissible to *add* to the devise that it was intended for the wife's jointure, it would in effect be passing her freehold right to dower by a nuncupative will.

If the provision be expressed in satisfaction of *part* of dower, it is not a good legal jointure, from the uncertainty.

It being necessary, then, to the validity of a legal jointure, to express in the instrument that it should be a jointure, and in lieu of dower, it is further requisite

---

(*a*) Tinney v. Tinney, 3 Atk. 8. S. P. Charles v. Andrews, 9 Mod. 152. (*b*) Moor, 31. 4 Rep. 4 *a*.

that the deed should be certain on that subject, and not leave the matter in doubt as to what part or proportion of the dower the jointure was intended to apply, when it was not meant to be in satisfaction of the whole.

If, therefore, the settlement mention the provision to be made in lieu of *part* of dower only, this will not be a jointure within the statute of *Henry* the eighth, because it is impossible to ascertain what part or proportion of the dower the jointure was intended to satisfy (*a*). Upon this subject, we find the following case proposed in the fourth report (*b*): If lands be conveyed to a woman *before marriage for part* of her jointure, and more land is conveyed to her after marriage for her full jointure, and in satisfaction of her whole dower, and then the husband dies; if the widow waive the land conveyed to her use *after* her marriage, she shall have the lands which were conveyed to her before the marriage in *part* of her jointure, and also her dower in the residue of the estate; because the conveyance in part of jointure was no bar to dower, from the uncertainty of the expression, and the impracticability of its application.

Contra if the uncertainty of the expression be removed by its application to particular lands.

But it is presumed that the husband may, previously to the marriage, purchase by a jointure his wife's dower in particular parts of his estate, if the lands are clearly ascertained in the deed; for the statute does not forbid this, but, on the contrary, virtually includes it, by giving the power to prevent by a jointure the wife's right to dower in the *whole* of his lands; and the general maxim applies to the case, viz. *Omne majus in se continet minus.*

6. A *trust*-estate not a good *legal* jointure.

Sixthly, Another requisite to a good legal jointure is, that it be made *to* the wife herself, and not to any persons in *trust* for her.

It was observed in the beginning of this section,

(*a*) Co. Litt. 36 *b*. 4 Rep. 3. (*b*) Page 3.

that the reason for the statute of *Henry* the eighth making jointures, settled on women prior to their marriages in lieu of dower, bars to that title in the residue of the husband's lands, was to counteract the effect of the same statute, in destroying the distinction between the possession and the use limited of the estates; for the consequence of that statute in drawing the possession to the *use* (to which use dower did not attach at the common law), would have been to have given a right of dower to widows in *all* the estates of their husbands not comprised in their jointures (which were generally settled to *uses*), unless the act had declared that jointures so made before the marriage, should deprive the widows of dower in the residue of the lands of their husbands (*a*). The act, therefore, had in contemplation such jointures only as were limited to the wife's use; so that where the *use*, instead of being limited *to* the wife, is limited to a stranger in *trust* for her, the jointure so made is not a *legal* jointure either within the letter or meaning of the act of parliament. And although the jointure be expressed to be in satisfaction of dower, and the widow accepts it, yet neither of those circumstances will give it validity at law (*b*).

Contra in Equity.

But it seems that a *trust estate*, being equally beneficial to the widow as a *legal* estate, both in certainty of duration and in profit, will be considered in a Court of Equity as a good jointure, within the meaning and spirit of the statute; so that, if the woman be of age at the time of the marriage, and lands are vested in trustees prior to the coverture, to pay to her the rents of them for life, or a rent-charge out of them from the death of her husband in satisfaction of her dower, that will be a good *equitable* jointure and bar her of dower (*c*).

(*a*) See p. 461. (*b*) Co. Litt. 36 *b*. 1 Atk. 563. (*c*) Hervey v. Hervey, 1 Atk. 561. Corbett v. Corbett, 1 Sim. & Stu. 612.

Lastly, the jointure will be good, although the lands settled be not *immediately* derived from the husband, but from trustees or feoffees, or the jointure be made by the father or such trustees or feoffees.

7. The provision will be a good legal jointure, although not made by husband, but his father, &c.

The letter of the statute of *Henry* the eighth merely extends to jointures made *by* the husband; but since, as before mentioned, the act has received a liberal construction, jointures made upon married women by the ancestors of their husbands, or through the medium of trustees for the husband, have been considered to be within the meaning of the statute.

Thus, in an *anonymous* case in *Moor* (*a*), the father made a feoffment in fee, upon condition that the feoffees should enfeoff the father's son, and the son's wife in tail, with remainder to the father's right heirs. They did so; and it was determined that this was a jointure within the intention of the statute. The decision was followed by *Ashton*'s case (*b*), in which the judgment was the same (*c*).

And although the wife be an *infant*, she will be bound by a jointure before marriage.

It was for a considerable period a question involved in uncertainty, whether a jointure made by the husband before marriage upon his intended wife, then an *infant*, was a good legal jointure under the statute of *Henry* the eighth, so as to bind her. The act is expressed in general terms, "every woman married having a jointure made shall not claim title to any dower," and it contains no exception in favour of infants. Since, therefore, the words of the statute were sufficiently comprehensive to include women under age, and there were many settlements in jointure upon women who were infants at the period the act was passed, and no exception made of infancy, it was contended that they were expressly bound, and were intended to be so by the statute: on the other hand it was argued, that so remarkable an

---

(*a*) Page 28, pl. 91. Ib. 93. pl. 231. (*b*) Dyer, 228 *a*, pl. 46. (*c*) See also Melles's case, cit. 4 Co. 4.

alteration in the law as the deprivation of an infant of her legal title by acceptance of a jointure, would have been more clearly expressed if it had been intended by the act, and some protection of her interest would have been secured by it. The doubt, however, has been removed by the highest Court in the kingdom, which has decided that women marrying under age, may be barred of dower by a jointure made previously to their marriages by their intended husbands, and consequently that such provisions are within the operation and effect of the statute. The case alluded to is *Drury* v. *Drury* (*a*).

There, by settlement, or articles made previously to marriage, it was agreed that the husband should receive all the personal estate of his intended wife, *then an infant,* and that she should have a net annuity of 600*l.* during her life for and in the name of her jointure, and in full satisfaction and bar of her dower or thirds in any lands, &c. which her intended husband then was or should during the marriage become seised of an estate of inheritance, and in full satisfaction of her share in his personal estate under the statute of distribution. The husband covenanted that his *heirs*, &c. should pay the annuity half-yearly. There were some real estates of the wife, which her husband covenanted and she agreed to settle, so as to give him the reversion in fee; but there was no decision upon the validity of that transaction. To this deed the wife was a party, and she executed it in the presence of her guardian, and with whose consent the marriage was solemnised. Her portion or fortune at that time was 2000*l.* The rental of her husband's real estate at his death was 2600*l*, and his personal estate amounted to 60,000*l.* The wife

---

(*a*) 3 Bro. Parl. Ca. Oct. Ed. p. 492. 2 Eden. 60. Wilmot's Opinions, 177. 4 Bro. C. C. 506, *n*. This case overruled Cray v. Willis, 9 Vin. Ab. 249, pl. 18. Wilmot's Opinions, 223.

became his administratrix, and insisted, that since she was an infant when her jointure was made and at the time of her marriage, she was not bound by it; she, therefore, claimed her dower, and also her third part of the personal estate under the statute of distribution. The children of her husband commenced a suit in Chancery against her, praying the usual accounts of her husband's real and personal estates, and that they might be secured and improved for their benefits, they being infants; and that the widow's jointure of 600*l.* might be secured to her. She set up such claim in her answer as above mentioned, waived her jointure, and insisted upon her dower and distributive share. The cause was heard before *Lord Henley* (afterwards *Lord Northington*) who decided in favour of the widow's claims. From this decree the children appealed to the House of Lords; which reversed it, after hearing the opinions of the Judges *seriatim* on the legal question, whether an infant was bound by a jointure (*a*)?

(*a*) Upon this point the judges were divided. Three were of opinion (with Lord Northington) that a jointure settled on an infant did not bar her right of dower: four of the judges supported the contrary opinion, which was adopted by Lord Hardwicke and Lord Mansfield, and confirmed by the judgment of the House of Lords.

How far the assent of the wife to a legal jointure made before marriage is essential.

The argument on this point ultimately depended, in a great measure, upon the question whether the agreement of the wife to a legal jointure made before marriage was necessary, to make it binding upon her, under the statute. It is not required that the wife should concur in the settlement by which the jointure is made, (see 1 Cruise, Dig. 228); and it is not in terms required that she should assent to it. But from the provisions of the statute as to settlements made after marriage, it is clear that it was not intended to enable the husband by his own act to impose on the wife in lieu of her dower any jointure which he might think fit. The Legislature seems to have assumed, that all antenuptial jointures must be settled by agreement of the parties, and there seems some reason for contending, that without such agreement the jointure would not in strictness be within the act, as by the common law the estate conveyed to the wife, by way of jointure, would not be effectually vested in her,

and the Court declared, that the widow was bound by the agreement entered into in consideration of and

---

without an actual or presumed acceptance on her part. If it was made with her privity, her marrying with notice of it, would of course be an acceptance of the settlement, and conclusive evidence of her agreeing to it. Estcourt v. Estcourt, 1 Cox, 20. But if it was made without her privity, she had the power of disagreeing to the estate conveyed to her, as soon as she became *sui juris*, and was apprized of the fact. Her disagreement would render the conveyance void, and it would seem that a jointure thus prevented from taking effect, would not bar her right of dower under the statute. It was, however, determined that a legal jointure was to be considered, not as a compensation for dower agreed for by the wife, but merely as a provision conferred upon her, and that it was not founded on any idea of contract; and hence it followed that in the case of the wife being an infant, no objection arose from her incapacity to contract. See 2 Eden, 62. 72.

Mr. Justice Wilmot, in his judgment, entered fully into the discussion of this question. He observed, that the bar to the right of dower did not arise from the agreement of the woman to a jointure made before marriage, but from the energy and force of the Act of Parliament substantiating the settlement against her for this particular purpose. Wilmot's Opinions, p. 194. He thought that the meaning of the Legislature with respect to women then married, was that those who had settlements made before their marriages should acquiesce under those settlements, and abide by the provisions thereby made for them, whether they were great or small, adequate or inadequate, whether they had been made by the agreement of themselves or their friends, or had been the mere spontaneous act of the husband or his ancestors, p. 202. The objection that the husband might before marriage settle an inadequate jointure on the wife without her assent or knowledge for the purpose of depriving her of dower, did not, as he observed, apply to cases of jointures made before the statute, as a fraud of that description could not then have been contemplated. But in cases subsequent to the statute, he thought that such jointures would be void on the ground of fraud, that the fraud might be pleaded at law, and that the fairness and competency would be a question to be decided by a jury, taking into consideration all the circumstances of the transaction. "A pocket jointure," he added, "made upon a woman, without her privity, or upon an infant with her privity, but without the interposition of parents or guardians, would be such an evidence of fraud as would be sufficient to condemn it."

An inadequate jointure made without the wife's assent, not binding on her.

In another case Lord Hardwicke suggested that Equity might re-

prior to her marriage, and which ought to be performed, also that she was barred of her dower, and of a distributive share of her husband's personal estate under the statute of distribution.

The points decided in the above case appear to be as follow:—1. that a jointure settled upon a female infant prior to marriage, attended with all the circumstances considered to be requisite by the statute to render jointures in general valid, will be obligatory upon her and bar her of dower. 2. That a *covenant* to make a jointure which would be good at law if it had been actually settled, will have the same effect in equity. 3. That it is not necessary that the jointure should be of real estates, as the literal construction of the statute requires, if from the terms of the instrument the heir is bound, and the widow may have the thing settled or agreed to be so secured out of lands, as in the present case the widow might have had the whole of the annuity secured out of part of her husband's real estates (*a*).

The points decided in the great case of *Drury* v. *Drury*.

---

lieve against a jointure merely illusory, 3 Atk. p. 612. See also Daly v. Lynch, 3 Bro. P. C. 478. ed. Toml.

(*a*) From the judgment of Lord Hardwicke, as given in Mr. Eden's report of Drury v. Drury, it appears that the case was decided on a more extensive principle than that stated in the text. Lord Hardwicke considered, that though the statute spoke only of jointures out of freehold estates, yet that a fair and certain provision out of any other species of property would be a good equitable jointure, and consequently a bar of dower. At the date of the statute freehold estate in land was the kind of property chiefly regarded, and the statute, therefore, applied to that only. But many other species of property had since grown up, by new improvements, commerce, and from the funds. Equity had, therefore, held that when such provisions had been made before marriage out of *any of these*, the wife should be bound: and he instanced particularly settlements of trust estates, copyholds, and money in the funds. And he held that such provisions, when settled on infants with the consent of parents or guardians were equally binding as when settled on adults, 2 Eden, 65, 66. The cases of Jordan v. Savage, and Williams v. Chitty (cited post) fall within these principles.

Jointure on infant good, though of property not within the statute.

And, 4, that the jointure may bar not only her dower, but also her distributive share in her husband's personal estate under the statute of distribution; and that although the disproportion between the value of her dower, distributive share and the jointure be very great, still such jointure will be good, and bar her of those rights (*a*).

A jointure of a trust estate will bind an infant.

It appears to be a necessary inference from the case of *Drury* v. *Drury*, that if the jointure be made of freehold estates, in *trust* for the infant, it will be a good equitable bar, although not a legal jointure.

If, however, the jointure be defective in any of the particulars which have been adjudged necessary to bring the provision within the intent and meaning of the statute of jointures, it will not, as it is presumed, bar the infant, but she may waive it at her husband's death, and resort to her dower (*b*).

An infant not bound by an uncertain or precarious jointure.

[An infant will not be bound by a jointure if her interest in the property settled, or the amount of the property itself be uncertain or precarious].

Thus, in *Caruthers* v. *Caruthers* (*c*), *Lord Alvanley* decided that the infant was not bound by a jointure from the uncertainty of its taking effect upon the death of her husband, (a legal requisite which was the first before considered (*d*),) as also probably upon the uncertainty of the provision itself, (which has also been considered under the fifth requisite necessary to a legal jointure (*e*)).

In that case the husband previously to the marriage with his wife, then an infant of the age of seventeen years, settled an estate (which was in the possession of the mother) on the *mother* for *life*, remainder to him-

---

(*a*) On these points see also Hervey v. Ashley, 3 Atk. 612, and Vizard v. Longden, 2 Eden, 66. Boynton v. Boynton, 1 Bro. C. C. 445. (*b*) But see the last note but one. (*c*) 4 Bro. C. C. 500. (*d*) *Supra*, p. 464. (*e*) *Supra*, p. 471.

self for life, remainder to his intended wife for life, *if* she survived him and his mother, as *part* of the jointure and provision *intended* to be made and secured for her, and in lieu, bar, recompense and full satisfaction of all demands or thirds, at common law, or by custom or otherwise, of all the messuages, &c. of which the husband might be seised during the marriage. The wife's father was a party to this settlement. No notice was taken in the settlement of what was to be the *other* part of the jointure; but before the marriage, the husband's uncle surrendered a *copyhold* estate, which was recited to have been made for making some *further* provision for the marriage, the uses of which surrender were limited to the *uncle* for *life*, remainder to the husband for life, remainder to the wife for life, if she so long continued a widow; but it was not stated to be in lieu or bar of dower, which was necessary (*a*). The husband's uncle died before him: his mother survived him. The question was whether the widow was bound by those provisions as a jointure? And *Lord Alvanley* decided in the negative.

[In this case, it was admitted that the jointure was not good at law, and *Lord Alvanley* held that as it only gave to the infant an uncertain and precarious provision, part of which she might never live to enjoy, it could not be established against her in equity as an agreement. He thought that *Drury* v. *Drury* did not mean to decide that the guardian could bind the infant to accept an uncertain provision, for in that case the wife had a provision as certain as her dower; and the Court could not perform such an agreement, without seeing that it was reasonable.

In *Smith* v. *Smith* (*b*), the settlement made on the marriage of a female infant, provided that on the husband's death his personal estate should be distributed

---

(*a*) *Ante*, p. 471. (*b*) 5 Ves. 189.

according to the custom of London; and that in case of his purchasing lands, the wife should, if she survived, have the same share of the lands as of the personal estate, and this was declared to be in lieu of dower, and thirds. The husband afterwards became bankrupt. It was held that the wife's right to dower was not barred by the settlement.

But it seems that a jointure on an infant is not void, though the enjoyment of it may be uncertain, by reason of the husband's title to the settled property being defective. If the defect be cured, she will be bound to accept the jointure in lieu of dower. If, on the other hand, the jointure fails, she will be entitled to recover the amount out of the estates of which she is dowable, as in other cases where a jointress is evicted (*a*).]

Jointure of *copyholds* not a good legal jointure.

It is observable that in *Caruthers* v. *Caruthers* the additional provision was made of a *copyhold* estate, which is objectionable, since copyholds are not included within the statute of uses, and that part of it which relates to jointures; so that a jointure of such lands is not at law a bar to dower. The reason is, that an estate by copy of court roll is disadvantageous to the widow, who must pay a fine upon admission, which she may be unable to do, and thereby commit a forfeiture; besides, widows are not intitled to dower by the general law of copyholds, which affords an inference that customary lands were not within the contemplation of the legislature (*b*).

[And copyholds not being within the statute, a jointure does not bar the widow's right to freebench at law (*c*)].

Freebench not barred at law by a jointure.

If, then, a settlement of copyholds, or of property less than freehold, be not a good legal jointure within the statute of *Henry* the eighth, except the widow can

---

(*a*) Corbet v. Corbet, 1 Sim. and Stu. 612. (*b*) Gilb. Ten. 182. Gladstone v. Ripley, cited 2 Eden, 59. Walker v. Walker, 1 Ves. sen. 54. (*c*) Walker v. Walker, *ub. sup.*

in the latter case, as against the heir, be intitled to the privilege of having the provision secured out of the husband's real estates, beyond which the case of *Drury* v. *Drury* is no authority (*a*); it was to have been inferred, from what before appears, that when the jointures upon *infants* before marriage were of copyhold or leasehold estates, they would not have been barred by them in equity, unless they had confirmed them by acceptance after the deaths of their husbands when *sui juris*, and under no disability. But there are two cases which appear to be irreconcilable with these observations, to which I must draw the reader's attention, first offering one remark, that a distinction must be made between jointures of these natures made upon infants and upon adults, since the latter being able to contract before the marriage will be bound in equity by their agreements, as will be afterwards shown, whether the jointures be good at law or not.

The first of the two cases is *Jordan* v. *Savage*, to be found in *Bacon*'s Abridgment (*b*). The husband was seised of copyholds, and by the custom of the manor the first wife of a tenant was intitled to freebench in all her husband's lands of which he was seised *during* the coverture. The husband in the present instance, in consideration of a marriage and marriage portion, covenanted with trustees to settle within two months after the marriage a part of his lands to the use of himself and his wife for their lives, with remainders over. It was declared that the lands so settled on his wife (who was an *infant*) should be in lieu of her customary estate. And the determination was, that she was bound by this jointure, although she was under age when it was made, and no party to the deed, and consequently excluded from her freebench.

(*a*) Vide *ante*, p. 479, note. (*b*) Vol. 3, Oct. Ed. p. 717. Mich. T. 6 Geo. II. S. C. 2 Eq. Ca. Ab. 102.

The observation which arises upon the perusal of the last case is, that the jointure not being a good one at law, for the reasons before given, was a voidable act as against the infant-wife upon the death of her husband; and unless she then confirmed it, of which the report is silent, the principle of the decision does not appear.

The second case before alluded to is *Williams* v. *Chitty* (*a*). There *A* and *B* being each possessed of a *leasehold* house, by settlement made before their marriage, assigned both of the houses to trustees, in trust for *A* for life, and from his death in trust for *B*, his intended wife, for life, and then an infant. By the same deed it was declared that 1500*l*. 3 per cents. which *A* had purchased with his own money, and part of *B*'s portion, and which had been transferred to the trustees, should be in trust for *A* and *B* during their lives, and the life of the survivor, &c. and it was also declared that the provision made for *B* should be in full of her jointure, and in bar of dower. *A* died seised of estates of inheritance of the annual value of 1000*l*. and upwards, and the yearly amount of the jointure was 152*l*. *B* claimed her dower and freebench upon the principle that she was not bound by her jointure, since she was under the disability of infancy when it was made. The Master to whom the cause stood referred, thought and reported differently, and upon evidence of *reputation* he stated that *B* was an infant at the time of her marriage. And *Lord Rosslyn* thought that the evidence was sufficient to prove the infancy, and disallowed *B*'s exception to the report, thereby decreeing that she was barred by the jointure.

Similar to *Jordan* v. *Savage*, the last case is not a legal jointure, either within the provisions of the statute or the case of *Drury* v. *Drury*; so that the question between the widow and the persons intitled to her hus-

---

(*a*) 3 Ves. 545—551.

band's real estates was to be decided according to the general law prevailing on the subject before the passing of the act. 'No rule or maxim was more thoroughly understood, than that an infant is unable by contract or consent, to part with his or her real estates, or any beneficial interest in them, and the exceptions which have been attempted to be made prove the generality of the rule. The act of the infant was at the least *voidable* (*a*). Hence it follows, that except by a special legislative authority, no woman under age can absolutely bind herself by a contract or agreement to part with her freehold estate or her interest in another's freehold property; and title to dower being an interest of the latter kind falls within the above rule; how therefore to reconcile the decision in *Williams* v. *Chitty*, with the rule of law applicable to that case, appears to be attended with no little difficulty (*b*).

From *dicta* in some cases, it has been inferred that jointures in equity upon infants, although not within the statute, would be binding if such provisions were *competent* (*c*). But what shall or shall not be so considered, is so vague and uncertain as, it would seem, to afford no sufficient data to induce a Court of Equity to interpose and compel a person to abandon a legal ascertained right, in consideration of a provision at the time deemed to be competent, but which may happen in the result to prove far below the value of the legal title in lieu of which it was substituted, as seems to have happened in the above case of *Williams* v. *Chitty*. The inconvenience that would attend this doctrine appears to have presented itself to the mind of *Lord Thurlow* in *Durnford* v. *Lane* (*d*), when he said, he

---

(*a*) *Inter alios*, see the cases of Holt v. Clarencieux, 2 Stra. 937. Zouch v. Parsons, 3 Burr. 1794. Perk. sect. 12. Co. Litt. 45 *b*. 171 *b*. (*b*) Vide *ante*, p. 479, note. (*c*) Caunel v. Buckle, 2 P. Will. 244. Hervey v. Ashley, 3 Atk. 612. (*d*) 1 Bro. C. C. 116.

thought that the Court should not go into the competence of the settlement. And this case appears to have been approved of by *Lord Eldon*, in *Milner* v. *Lord Harewood* (*a*).

Equitable jointures.

II. The next subject for consideration is, what will be a binding jointure upon the wife in a Court of

---

(*a*) 18 Ves. 275. The rule established by Drury v. Drury, and the other cases referred to above, appears to be, that a female infant may be barred of dower by an antenuptial settlement of any species of property, made with the assent of her parents or guardians, if the provision secured to her be reasonably certain and competent.

An infant not bound by a jointure unless of competent amount. *Sembl.*

There has not, indeed, been any express decision that competency in point of amount is essential to an equitable jointure on an infant, but it appears to be a necessary consequence from the reasoning in Drury v. Drury, and Caruthers v. Caruthers, and from the general expressions, that the agreement will not be binding in equity on the infant unless it be reasonable, 4 Bro. C. C. 513. See 1 Bro. C. C. 153. If the jointure be so scanty as to be merely illusory, it seems to be clear that it will not be established: on the other hand, it was decided in Drury v. Drury, that it is not necessary that it should be equal in value to the dower; and it seems to be sufficient, if the provision be one which it was fair and prudent for the parent or guardian to assent to. It must be admitted, however, that the rule by which the validity of such agreements depends upon their being reasonable, leaves room for many questions, for the decision of which the cases do not furnish any certain criterion.

Assent of parents or guardians to a jointure on an infant not indispensable. *Sembl.*

Though the assent of parents or guardians is generally mentioned as material to the validity of a jointure on an infant, it does not seem to be in all cases indispensable. With respect to legal jointures, as they are, according to Drury v. Drury, binding independently of contract, when fairly made and conformable to the statute, the assent of parents or guardians is material only for the purpose of obviating any suspicion of fraud, and of evidencing the fairness of the transaction. It seems to follow that their assent is not necessary, if the fairness of the transaction appears from other circumstances, and the jointure be in other respects free from legal objections. Probably the analogy would be followed with respect to equitable jointures, at least where the want of the concurrence of a parent or guardian is reasonably accounted for, as in case of their being dead or absent, or where, as in Williams v. Chitty, the settlement is made on the supposition of the wife being of age at the time. See further as to marriage settlements on infants, *post*, chap. 13, sect. 2.

Equity? It may be generally observed upon this question, that, as at law, the provision will be obligatory when it is made before marriage, if the woman be of age; so it will be in equity. And that, as at law, the jointure will not be binding when it is made after the marriage, neither will it be so in equity; but its validity will depend upon the widow's acceptance or refusal of it after her husband's death.

It may be convenient, in treating upon this subject, to revert to the requisites for a good legal jointure before mentioned, and then show in what particulars equity differs or varies from the law in these respects; the reader not forgetting that the authority of Courts of Law for admitting collateral provisions in bar to the right of dower is founded upon a special statute, and that the jurisdiction of Courts of Equity, in these matters, existed before that act, upon the principle of enforcing agreements entered into between individuals.

Good if made before marriage with wife's consent, although they be not made to begin from husband's death.

The first requisite which, as before noticed, is necessary to a binding legal jointure is, that it be made to commence in possession or profit immediately from the husband's death(*a*). With this agrees the rule in equity, except the intended wife be a party to the deed, and by executing it consent to accept a more uncertain and disadvantageous provision in lieu of dower, for then she will be bound and absolutely barred of her common law right. Accordingly, *Lord Alvanley*, adverting to this subject in *Caruthers* v. *Caruthers* (*b*), said, "that if the wife had been adult she might have taken a *chance* in satisfaction for her dower, acting with her eyes open."

With respect to the legal requisite, that the estate limited in jointure be such an estate of freehold, as should continue during the wife's life, except it determine sooner by her own default (*c*), no such circum-

---

(*a*) *Supra*, p. 464. (*b*) 4 Bro. 513.
(*c*) *Supra*, p. 466.

stance will be necessary in equity in order to make the jointure an absolute bar to dower, if the intended wife be of age and a party to the deed; because she, being able to settle and dispose of all her rights, is competent to extinguish her title to dower upon any terms to which she may think proper to agree. Upon which agreement it is that a Court of Equity acts and binds her; so that if she accept of a term for years (*a*), or an annuity (*b*), or copyhold lands (*c*), &c. in lieu of her dower, she will be concluded, and barred of her common law right. And, in truth, the inconveniences which attend a limitation of lands in jointure are so numerous, that it has been the general practice for a long time past to limit or grant a rent-charge to the intended wife during her life, to begin at her husband's death, with powers of distress and entry, secured also by a term of years (*d*).

As of a term for years, &c.

Usual method of settling jointures.

If the jointure rest in covenant or articles it is binding, if made before marriage.

The jointure will be equally good and binding upon the husband and wife, and bar her of dower, if it be not absolutely and completely settled upon her by deed, but rest merely in covenant or articles *before* the marriage, because a Court of Equity will decree a specific performance of such a covenant or articles, by directing a settlement which will have relation to the period when it ought to have been made (*e*).

Election.

That the jointure, in order to be an absolute bar of dower, ought to be made *before* marriage, is equally a rule of equity as of law; and in both jurisdictions, when the provision is a jointure after marriage within the statute of *Henry* the eighth, but waivable by the widow, she will be obliged to elect between such a

---

(*a*) Rose v. Reynolds, 1 Swan. 446. Charles v. Andrewes, 9 Mod. 152. (*b*) Vizard v. Longden, cited, 2 Eden, 66. (*c*) Lacy v. Anderson, 1 Swan. 445. Gladstone v. Ripley, cited, 2 Eden. 59. And a jointure will in equity bar the right to free-bench. Jordan v. Savage, *ante*. Walker v. Walker, 1 Ves. sen. 54. Warde v. Warde, Ambl. 299. (*d*) See the form of such a deed, in Append. No. (9) Vol. 2. (*e*) 3 P. Will. 269.

jointure and her dower; but if such provision be not a legal jointure within the act, then the law, as we have seen (*a*), cannot put her to an election, but she will be intitled to both the provision and her dower (*b*). Here the concordance between law and equity ceases; for Courts of Equity, acting upon the intention of the parties making and accepting the provision, and upon the conscience of the widow, oblige her to elect between her dower and the provision settled in jointure upon her, and on this principle, that it would be unconscientious in her to take a thing itself, and also that which is given in lieu of it; so that whether the provision be made before or after marriage, if it be not conclusive against her but voidable only, she will not be permitted in equity to take both it and her dower, but she will be put to her election between them. The rule is established by a variety of determinations, which will be adverted to when the doctrine of election is considered.

It has been noticed under the fifth requisite of a legal jointure, that it ought to be expressed in the instrument to be in satisfaction of the *whole* of the wife's dower (*c*), or at least of her dower in lands particularly described, and that since the statute of frauds and perjuries, *parol* evidence is inadmissible to prove the intention to have been so, if the deed or will settling the jointure, were silent upon the subject. The practice of a Court of Equity so far agrees with the rules of law, that if it appear upon the face of the instrument that the provision was only intended in satisfaction of *part* of dower, leaving the proportion in uncertainty, and in respect of what lands dower was meant to be barred by it, such provision will not bind the widow, but she will be intitled to dower upon giving up the provision (*d*): and with respect to *parol* averments, the

Actual expression that the provision on the wife was in lieu of dower, not necessary.

But *parol* evidence of that intention is inadmissible.

(*a*) *Supra*, p. 470. (*b*) Co. Litt. 36 *b*. (*c*) *Supra*, p. 470.
(*d*) See the case of Caruthers v. Caruthers, 4 Bro. C. C. 500.

rule of evidence is the same in equity as at law. It is to be presumed, therefore, that since the statute of frauds, no such averment can be admitted in equity, to prove an intention that the jointure was meant in satisfaction of dower (*a*). But it is not necessary that the provision for the wife should be expressly stated to be in lieu or satisfaction of dower; it will be sufficient if it can be clearly collected from the contents of the instrument, that the provision was intended to be so.

Semble, that a provision before marriage, expressed for wife's livelihood, a good equitable jointure in bar of dower.

Accordingly, in *Vizard* v. *Longdale* (*b*), a bond was given by the husband, before marriage, for the settling an annuity of 14*l.* upon his wife, for life, for her *livelihood* and maintenance: *Sir Joseph Jeykyll* decided that the provision was no bar of dower; but *Lord King* reversed the decree, stating it to be his opinion that it was within the equity of the statute of jointures, and a bar to dower.

A doubt was expressed by *Lord Rosslyn*, in *Crouch* v. *Stratton* (*c*), of the authority of the last case; but when it is considered, that the definition of a jointure is a competent *livelihood* of freehold, &c., and that the consideration of the bond is expressed to be for the livelihood, &c., of the wife, *Lord King*'s opinion that it was intended for a jointure, may not, probably, be considered without foundation. It is to be remarked, that the case of *Crouch* v. *Stratton* is quite consistent with *Vizard* v. *Longdale*. In the former, the husband covenanted by settlement (*d*) before marriage, that his heirs, &c., should within *three* months after his de-

---

(*a*) 3 Atk. 8, et *supra*, p. 471. (*b*) Stated 3 Atk. 8. 1 Ves. sen. 55, and 2 Eden's Rep. 66.. (*c*) 4 Ves. 394.

(*d*) The settlement was expressed to be for making some provision for the wife and her issue. In Walker v. Walker, 1 Ves. sen. 54, where the expression was similar, Lord Hardwicke said, "The words *provision if she survive*, mean the same as in Vizard v. Longdale, and the word *some* makes no difference, for it is not said *some part*." On this question see also Garthohore v. Chalie, 10 Ves. 1, 20.

cease, pay to trustees 6000*l.*, with interest from his death, upon trust, in case his wife should be the survivor, and there should be no issue then living, &c., to pay for her own use, 1500*l.*, part of that sum, with interest, and also to pay to her the interest of the remainder during her life. *Lord Rosslyn* held, that the provision did not bar her of dower.

Contra, if the provision be general.

It is observable, there was no expression in the settlement, as in *Vizard* v. *Longdale*, to show any intention that the provision was meant to be a jointure in satisfaction of dower. But when a man, in contemplation of marriage, expressly provides for the livelihood and maintenance of his intended wife *after* his death, the circumstance seems to amount almost to demonstration, that he made such provision in lieu of any other which the law might have provided for his widow, for the same purpose, and in the same language.

[It was decided by *Lord Hardwicke*, that a jointure expressed to be settled in lieu of dower, also barred the wife's right to free-bench (*a*).]

The doctrine relating to the satisfaction of dower by the husband's testamentary disposition, will be considered in that part of this work in which are discussed those acts of the widow which will estop her from insisting upon dower; for whether those provisions will or will not be a satisfaction of her legal right, depends upon her own election (*b*).

III. The next subject which it was proposed to consider, was the jurisdiction of Courts of Equity in relieving or assisting jointresses, and of jointuring powers.

1. It has been observed, that a jointure agreed by the husband, before marriage, to be made upon his intended wife, will be good in equity, although it be not

Agreement to jointure enforced in equity.

(*a*) Walker v. Walker, 1 Ves. sen. 54. (*b*) See chap. 11, sec. 3, pl. 4.

actually so settled, but is permitted to remain in articles, or upon the husband's covenant (*a*); for such a jointress being a purchaser of the provision by the marriage, is intitled in that character to the aid and protection of a Court of Equity; accordingly such articles or covenant will be specifically performed (*b*).

Such an agreement will defeat a prior voluntary conveyance.

It is also to be remarked, that upon the principle of the wife being a purchaser of her jointure, she will be intitled to hold it against a prior voluntary conveyance of the same property, made by her husband (*c*). And

Elopement no bar.

it will be no objection to a performance of articles or a covenant to settle a jointure, that the wife eloped from her husband, and lived in adultery, because no law has created a forfeiture by any such acts (*d*).

Equity will supply a deficiency in the amount of the jointure.

A Court of Equity will also assist the wife in subjecting her husband's assets to make good any deficiency in her jointure, when he has covenanted or agreed that it was or should be of a particular amount or value. This was done in the case of *Probert* v. *Morgan* (*e*), and the other cases referred to in the note (*f*). But a

When the agreement to settle will be a *lien* on the husband's lands.

distinction is to be noticed when the agreement or covenant to settle, &c., is mentioned to be of *particular* lands, and when of lands not specified, but to be of a certain annual value. In the first case, the agreement or covenant is a *lien* upon the lands noticed and specified, and will have a precedency to specialty debts; but in the second instance, the wife will have no lien, and can only class, *pari passu*, with the specialty creditors of her husband (*g*).

(*a*) *Supra*, p. 488. (*b*) 2 P. Will. 222. (*c*) *Supra*, chap. 8, and 1 Chan. Ca. 100. (*d*) Sidney v. Sidney, 3 P. Will. 269. (*e*) 1 Atk. 440. (*f*) Speake v. Speake, 1 Vern. 217. Grove v. Hooke, 4 Bro. Parl. Ca. oct. Ed. 593. 2 Eq. Ca. Ab. 218, 389. Prime v. Stebbing, 2 Ves. sen. 409.

(*g*) Girling v. Lee, 1 Vern. 63. Freemount v. Dedire, 1 P. Will. 429. Carpenter v. Carpenter, 1 Vern. 440. Parker v. Harvey, 4 Bro. Parl. Cas. 604. Hedges v. Everard, 1 Eq. Ca. Ab. 18. See

Remedy on eviction of a legal jointure.

[Where a widow having a legal jointure, is evicted of the whole or a part of it (*a*), by superior title, she is under the statute 27 Hen. 8, chap. 10, sect. 7, intitled to be endowed of as much of the residue of her husband's real estates, as the lands of which she is evicted amount to. This right is the same whether the jointure was made before or after the marriage (*b*), and if the eviction of the jointure lands takes place during the coverture, the widow has the same right to compensation by endowment out of the other estates (*c*). If the husband has aliened his other estates, the widow's right to dower being revived on the eviction, she may inforce it at law against the purchaser (*d*). The effect of the eviction is to remit her to her dower *pro tanto*: if the value of the dower be greater than that of the jointure, she recovers the amount of the latter only (*e*). If the value of the jointure be greater than that of the dower, she is not intitled, under the statute, to recover any thing beyond her dower (*f*), and she will only be intitled to hold the lands recovered during her life, though her jointure may have been settled on her in tail or in fee simple (*g*).

But if the jointure be made by an antenuptial settlement, in consideration of which the wife, being adult, agrees to relinquish her right to dower, and she be afterwards evicted, it seems that although her right to dower is revived at law, she will in equity be precluded from claiming it. Thus in *Simpson* v. *Gutteridge* (*h*), where a jointure rent charge had been settled in pur-

---

Glegg v. Glegg, 4 Bro. Parl. Cas. 614. 2 Eq. Ca. Ab. 27. Eustace v. Keightley, 4 Bro. Parl. Cas. 588. Fothergill v. Fothergill, 2 Freem. 256. 1 Eq. Ca. Ab. 221.

(*a*) Gervoyes's case, Moore, 717. (*b*) Ibid. and Beard v. Nuthall, 1 Vern. 427. (*c*) Gervoyes's case. (*d*) Maunsfield's case, Co. Litt. 33, *a*. note 8. (*e*) 1 Sim. and Stu. 620. (*f*) See Beard v. Nuthall. Tew v. Winterton, 3 Bro. C. C. 489. 1 Ves. Jun. 451. (*g*) 4 Co. 3, *b*. (*h*) 1 Madd. 609.

suance of articles made before marriage, the wife being of age at the time, it was held that she was barred from all claims of dower, and therefore that a purchaser of other lands belonging to the husband was not intitled to call for the production of the title to the rent charge.

Remedy on eviction of equitable jointure.

Where the jointure is equitable, the consequences of eviction will, it is presumed, be the same as if it were legal. In *Drury* v. *Drury*, *Lord Hardwicke* observed, that if the husband, who on marrying an infant had covenanted for payment of an annuity by way of jointure, had dissipated his property, that would have been an eviction in equity, and consequently would have given the wife a right to dower, like the case of an eviction at law (*a*). So it has been suggested, that if on the marriage of an infant an annuity charged on money in the funds in the names of trustees, were settled by way of jointure, and the fund were wasted by the trustees, this would amount to an eviction, and the widow would not be restrained from proceeding for her dower (*b*). In *Tew* v. *Winterton* (*c*), the husband gave a bond to secure an annuity to the wife in case of her surviving, and by a memorandum subscribed to the bond, she declared that she accepted the said jointure in bar and satisfaction of all dower and thirds. On the husband's death, the Court decreed the payment of the annuity out of his assets, and in case they should not be sufficient, then out of certain estates of which he was tenant in tail, provided the deficiency did not exceed the amount of the dower to which the wife would have been intitled, if she had not by the memorandum accepted the annuity. This was said by *Lord Thurlow* to be a very subtle equity (*d*), and the case appears to be at variance with that of *Simpson* v. *Gut-*

(*a*) 2 Eden, 68. (*b*) See Sugden on Vendors, p. 306, 5th Ed.
(*c*) Cited *supra*, p. 493. (*d*) 1 Ves. Jun. 452.

teridge, unless the memorandum signed by the wife was looked upon as amounting only to a conditional relinquishment of her right to dower.

Independently of the wife's right to recover dower on eviction of her jointure, she may also in that case resort to any remedies which she may have against her husband's assets by covenant or otherwise. Thus in *Beard* v. *Nuthall* (*a*), the husband after marriage gave a bond to settle a jointure of a certain amount on his wife; he accordingly settled on her lands of which she was afterwards evicted, and it was held that she might proceed at law for recovery of her dower, and if that fell short of the jointure in value, she was to receive the difference out of her husband's assets, as a bond creditor.]

If there be an outstanding satisfied term for years, preventing the widow from obtaining her jointure at law, a Court of Equity will relieve her, by enjoining an heir or devisee from setting it up, as also a purchaser, if he had notice of her title at the time of his purchase (*b*).

Not performed against a *bonâ fide* purchaser *without* notice.

It must be further noticed, that a Court of Equity will not decree the performance of an agreement to settle a jointure upon the wife, against a person who has equal equity with herself, but who, in addition, has obtained the legal interest in the estate; as in the instance of a purchaser, under a conveyance, of the legal estate, who has paid his purchase-money without notice of the agreement or covenant. But if he be affected with *notice* of the agreement or covenant, prior to the completion of his purchase, he will be considered a trustee for the wife, and obliged to make good her jointure (*c*). And although he have notice, yet if he be not the *immediate* purchaser, but claims

Nor against his vendee *with* notice.

(*a*) Cited *supra*, p. 493. (*b*) Pre. Ch. 65. See last chap. sect. 2, p. 371. (*c*) 2 Vern. 271. 599. 2 P. Will. 681. 1 Atk. 571.

from one who had no notice of the agreement, a Court of Equity will not in that case interfere at the suit of the wife; because if it were to do so, it would be injurious to the *bonâ fide* purchaser without notice, from whom the purchaser with notice claimed, since the former would be liable to answer over in damages, upon the eviction of the latter (*a*).

Powers of jointuring.

2. Powers requiring certain formalities, are frequently granted to tenants for life, to make jointures upon women whom they may marry; which formalities ought in strictness to be observed, as it was noticed on a prior occasion (*b*). Yet if the persons having those powers, happen to omit any of the circumstances required by them in their execution, or if such persons engage to execute them, but die before they perform their agreement, a Court of Equity will interfere on behalf of the intended jointresses, and supply the defects, jointresses being purchasers of the provisions by the marriage contract (*c*).

Their defects supplied in equity.

Thus if a power require its execution to be by *indenture*, and it be executed by a *deed poll*, or *will*, as in *Tollet* v. *Tollet* (*d*), or if the signing of the party be directed to be attested by *three* witnesses, when such signature is made in the presence of *one* or *two* persons only (*e*); in these and the like cases, the mistakes will not be allowed to vitiate the execution of the powers. The principle laid down by *Lord Redesdale* is this; "That where a person acts for *valuable* consideration, as upon marriage, he is understood in equity to engage with the person with whom he is dealing, to make the instrument as effectual as he is able; and whenever that is the case, there is nothing in any of the autho-

---

(*a*) 2 Bro. C. C. 66. (*b*) *Supra*, p. 116. (*c*) See the form of a power to jointure, in Append. No. 8, vol. 2. (*d*) 2 P. Will. 490. (*e*) Cotter v. Layer, 2 P. Will. 623. Sergeson v. Sealey, 2 Atk. 415. Wade v. Paget, 1 Bro. C. C. 363.

rities to raise a doubt that it shall have effect, so far as the person executing it has the power; and where the nature of the instrument is contrary to what the power prescribes, but demonstrates an *intent* to charge, it shall have the operation of charging in that form which the power allows (*a*)."

If the intent to execute power, appear in writing, it will be sufficient.

It follows, therefore, that however the intent be shown, if it be in writing the Court will, in aid of the intention, supply the defects in the mode of execution in favour of the jointress; so that whether the intent to execute the power be by letter, memorandum, will, articles, or covenant, a Court of Equity will aid the jointress, and supply all omissions (*b*).

[Hence if the husband by marriage articles covenants to make a jointure of a specified value, by virtue of a power, and afterwards settles on the wife lands of less value, the deficiency will be made good against the remainder-man out of the other lands subject to the power (*c*).]

Agreement by tenant for life in remainder to execute his power when in possession is good,

Where the power is to be exercised when in possession, it is not necessary that the husband should at the time he covenants or agrees to make the jointure, be in possession of the estate, provided he afterwards live to succeed to it. Thus, if tenant for life in *remainder*, with a power of jointuring, engage to make a jointure upon his wife, when he shall come into possession of the lands, it will be good in equity, if he survive the persons whose interests preceded the estate limited to him (*d*); and the agreement may also be good, although he do not mention or allude to his power in the agreement.

and it may be so although the power be not alluded to.

(*a*) Cited 2 Ball and Beat. Rep. in Irel. 44. (*b*) Coventry v. Coventry, 2 P. Will. 222. 10 Mod. 469. Vernon v. Vernon, Ambl. 1. (*c*) Clifford v. Burlington, 2 Vern. 379. Marchioness of Blandford v. Duchess of Marlborough, 2 Atk. 542. See 2 Ves. sen. 505. Fothergill v. Fothergill, 2 Freem. 256. 1 Eq. Ca. Ab. 221. (*d*) Alford v. Alford, 1 Stra. 604.

Thus in *Jackson* v. *Jackson* (*a*), by indentures made between *A* and *C*, his wife, and *B*, their son, certain estates in *Yorkshire* were settled on *A* for life, remainder to the use of *C*, to secure an annuity, remainder to *B* for life, with remainders over. A power was given to *B*, when in the actual possession of the premises under the settlement, to limit all or any of them to the use for life of any woman whom he might marry, for a jointure, in bar of dower. By articles previous to the marriage of *B*, he and *A* covenanted, that within twelve months after the marriage, *B* would settle upon *D*, his intended wife, a sufficient estate during her life, to take effect in possession from *A*, the father's death, in freehold lands in the county of *York*, of the yearly value of 100*l*., or a like annuity to be issuing out of lands in that county. *B* survived *A*, and died without having made any settlement according to his covenant; and the question between *D* and the person in remainder was, whether she was intitled to have the covenant performed? And *Lord Alvanley*, M. R. was of opinion that she was so intitled.

It is observable that in the last case the son had no other property in the lands but his interest in the *Yorkshire* estate; and the grounds of *Lord Alvanley*'s decree were these:—1st, that it appeared that the power was in the contemplation of the parties at the time when the articles were entered into;—2dly, that the *Yorkshire* estate was the only one upon which the covenant could attach;—and 3dly, because the covenant did attach and bound the husband to perform it as he could, the Court considering that he intended to do so for a person claiming *bonâ fide*, and for a valuable consideration.

If the intent to execute the power be uncertain, equity cannot enforce it.

But if, at the time of the agreement or covenant to settle a jointure, the husband have lands besides those

---

(*a*) 4 Bro. C. C. 462. See also Lowson v. Lowson, 3 Bro. C. C. 272.

to which the power extends, and he does not refer to such power, or otherwise show an intention to execute it; then, as the agreement or covenant may be performed either under the power, or out of the husband's interest in the other property, there is no reason why his engagement should be applied more to the one than to the other. Since, therefore, an intent to execute a power is necessary either by a reference to it, or from clear intention appearing upon the instrument (*a*), and that intent is wanting in the present instance, the general agreement or covenant cannot, from uncertainty of application to the lands comprised in the power, and to the power itself, be a *lien* upon such lands; so that there is no sufficient ground for a Court of Equity to consider such an agreement as an execution of the power, or supply any defect in the presumed execution of such a power, when it is doubtful whether the donee had it in his contemplation, or meant to make the settlement under its authority. This appears to be the true principle of the decree in the case of *Elliot* v. *Hele* (*b*).

It is no objection to equity supplying a defect in the power's execution that wife is otherwise provided for.

It has been considered, that if the wife have a provision independent of the jointure intended to be settled upon her, a Court of Equity will not supply any defect in the execution of the jointuring power; but such a rule has never prevailed. Of the *quantum* of the provision for the wife the husband is the best judge (*c*). In aiding the defective execution of powers to jointure, it has never entered into the view of the Court, whether the provisions meant to have been made for the wife were voluntary or not; for the provisions being intended, and the objects being the wives

---

(*a*) Holmes v. Coghill, 7 Ves. 499. Brown v. Higgs, 8 Ves. 570. Lowson v. Lowson, 3 Bro. C. C. 272. M'Leroth v. Bacon, 5 Ves. 159; and Dillon v. Dillon, 1 Ball and Beat. 77. (*b*) 1 Vern. 406. (*c*) Tudor v. Anson, 2 Ves. sen. 582. Smith v. Baker, 1 Atk. 386. Chapman v. Gibson, 3 Bro. C. C. 229.

Nor to the Court enforcing an agreement to execute the power.

of the appointors, these circumstances have always been considered sufficient to intitle the Court to assist the appointees in carrying into effect the appointments, though defectively made; as also agreements to execute such powers, when they have been omitted to be formally executed by the contracting party (*a*).

The forms of powers enabling husbands to settle jointures on their wives frequently differ in expression. It will, therefore, be useful to consider some of the appointments which have, and which have not been considered as authorised by such powers.

What deductions to be made in executing a general power to settle a particular sum as a jointure.

Sometimes the power to jointure is framed in very general terms, as "to make a jointure of lands not exceeding 600*l.* a year." In such cases an appointment of a *net* yearly sum of that amount would be improper; for under such a power the annuity is liable in the hands of the widow to the payment of all public *taxes*, repairs, and other usual outgoings to which the lands were liable (*b*).

What deductions when power is to settle a *clear* yearly sum.

At other times the power expresses the jointure to be made thus: "not exceeding in the *clear* yearly value 100*l.*, or 100*l.* a year for every 1000*l.*, for the portion which the donee may receive with his wife." This occurred before *Lord Hardwicke*, in the case of *The Earl of Tyrconnel* v. *The Duke of Ancaster* (*c*), in which his Lordship expounded the word *clear* as follows: "Where nothing but the word *clear* is used, it is a right rule to construe it as it would be between buyer and seller of estates. *Clear* must not mean all outgoings like a rent-charge, as losses by tenants and management, to which a rent-charge is not liable. Then what is the rule to go by? What would be understood between buyer and seller; that is, all re-

---

(*a*) 1 Atk. 567. (*b*) See the case of the Countess of Londonderry v. Wayne, 2 Eden Rep. 170. Ambl. 424, S. C.; and Hervey v. Hervey, 1 Atk. 561. Barnard, Ch. Rep. 103. (*c*) 2 Ves. sen. 504.

prises and *incumbrances*, and all *extraordinary* charges, unusual and not agreeable to the course of the country; and the land-tax is not to be considered. Although the land-tax is to be considered as a burden, it is contingent in itself, because the value is contingent, and that is a reason why it ought to be taken in, notwithstanding it is not taken in between buyer and seller. *Tithe* is such as it ought to be free from; so of a *fee-farm* rent, which is an incumbrance by *private* title. Then as to *poor-rates* and *church levies*, if in this country the usual course of letting estates had been to let them subject to these charges, I should have taken the power in that sense, that the jointure should be charged with these payments; for when a person creates a power, and makes a jointure as a *clear* jointure in lands, it must be considered as lands of a clear rent according to the course of letting in that country, and not be liable to extraordinary charges by contract." *Lord Hardwicke* decreed that the widow was intitled to a jointure, not exceeding the clear yearly value of 1000*l.* at the time of the settlements made, viz. clear of incumbrances, and all other charges which, by the course and usage of the country in which the lands were, ought to be borne by the *tenant;* but subject to the land-tax, and all other outgoings which according to such course of the country ought to be borne by the *landlord.*

What charges, &c. a jointure of a sum of money under a power expressing it to be without deductions for *taxes*, &c. will not be liable to.

Some of the powers have not left their meaning to be decyphered under the general terms *clear*, &c. as in the preceding instance, but they have descended to particulars, as in the case of *The Marchioness of Blandford* v. *The Duchess of Marlborough* (*a*). There the power to settle a jointure out of lands was a yearly sum "not exceeding 4000*l.*, without any deductions or abatement for any *taxes*, *charges*, or *impositions*, im-

(*a*) 2 Atk. 542.

posed or to be imposed, parliamentary or otherwise." *Lord Hardwicke* was of opinion that the land-tax was to be deducted under the power, since taxes were particularly named; observing that it would be very strange to hold the most public tax in the kingdom should be meant to be excluded, when the words imposed and to be imposed were used in the power (*a*). But his Lordship, in reference to this case, said, in that of *Tyrconnel* v. *The Duke of Ancaster* (*b*), that if the word taxes had not been mentioned in the power, he should not under the other words have considered the jointure to be exempt from deduction for taxes, and consequently not from the land-tax. His Lordship decreed in the present case that, under the words of the power, the Marchioness was intitled to such a jointure as, at the time of her husband executing the articles engaging to settle 3000*l.* a year upon her under such power, was of the annual value of 3000*l.*, *free* from all incumbrances, rent-charges, rents-seck, fee-farms, quit-rents, annuities, stipends to ministers, pensions and procurations, and also from all parliamentary taxes or impositions which were in being at the time the power was executed, and in particular the land-tax then in existence.

Semble, that the value of the jointure is to be estimated and settled when the power is executed.

From the two last cases determined by *Lord Hardwicke*, as also from *Pinnell* v. *Hallet* (*c*) decided by him, and *Speake* v. *Speake* (*d*) determined by *Sir Francis North*, Lord Keeper, it would appear, that the time for ascertaining the clear yearly value of the jointure, and its exemption from taxes, &c. is the period when the power is executed; and also that the rule would be the same when the words of the power are prospective, directing the exemption from taxes, &c. *to be* imposed, &c.; so that it might have been con-

---

(*a*) See 1 Bro. C. C. 4, *note*. (*b*) 2 Ves. sen. 504.
(*c*) Ambl. 106. (*d*) 1 Vern. 217.

sidered settled in practice by the authorities before referred to, that when the jointure of lands is not to exceed a particular yearly sum, suppose 4000*l.*, after making the above deductions, such yearly value would be irrevocably fixed at the time when the jointure is made; the consequence of which would be, that whether the value of the lands afterwards decreased, as by the imposition of new taxes (*a*) or otherwise, or whether they increased, no alteration in their value was to be allowed as between the widow and the heir, or the person in remainder; and there is no injustice in this rule, for if the lands increase in value the widow has the benefit of it, and if they diminish in value she ought to bear the loss. But the contrary doctrine would be attended with this inconvenience; these powers would be always executory, fluctuating, and desultory; incapable of being finally executed, and the heir or person in remainder would be in continual hazard of being brought into a Court of Equity by the jointress, to make good a subsequent deficiency in the amount of her jointure, from new impositions or losses which occurred after its settlement. But a decision has been made since the foregoing cases, which is considered to be contrary to them, and therefore to have unsettled what they were previously thought to have determined. The case was the *Countess of Londonderry* v. *Wayne* (*b*); but it may probably be reconciled with them upon fair comparison and consideration.

The case of Londonderry v. Wayne considered.

The father devised his real estates to *A* his first son for life, remainders over. A power was given to *A* and the other tenants for life when in possession, to jointure any part of the estates not exceeding the yearly value of 400*l.* By articles before marriage, *A* covenanted to convey, within six months after the mar-

---

(*a*) 2 Ves. sen. 502.

(*b*) Reported in Ambl. 424, and 2 Eden, 170.

riage, lands and tenements of inheritance in possession, in two manors, of the annual value of 400*l.* clear of taxes and reprises, upon himself for life, remainder to his intended wife for life, with remainder to the issue male of the marriage. *A*, in pursuance of his engagement and in execution of his power, conveyed by a deed of settlement after the marriage, lands within the two manors, which, with an annual pension of 4*l.* payable out of a rectory, and after making deductions for tenants, boons, &c. brought the jointure within 400*l.* a year. But *A* also *covenanted*, that if the premises settled *should* fall short of that annual value, either on account of 200*l.* which were payable to *B*, or by lawful eviction or incumbrance, it should be made up out of other lands devised to him by his father and within the power. After *A*'s death the widow made a claim arising upon a deficiency in the value of the settled estates. This claim was made in the year 1754, the settlement having been made in 1733, and the husband had been dead about five years. *Lord Henley* decreed that the value of the jointure should be estimated as it was at *A*'s *death*, and not at the time of the execution of the settlement, as in the prior cases.

The observations which occur upon the perusal of the last case are these: that it differs from the preceding cases in the form of the covenant entered into by the settlor, from which the intention appears to have been, that the value of the jointure, at the time of the execution of the power, was not to be conclusive upon the wife, but should be subject to investigation at the settlor's death, when his widow's title to the possession of the lands commenced, and at which period it was meant and covenanted, that her jointure should be 400*l.* a year. That the covenant was *prospective*, viz. if the premises that had been settled, *should* fall short, &c.: which showed the settlor's meaning, that the value was not to be irrevocably fixed by the settlement containing

such a covenant. That the covenant seems to have been intended to counteract the rule established by the preceding cases, and to be a security for the value of the jointure being 400*l.* a year at the period of the husband's death. This distinction appears to reconcile the present case with the preceding decisions. If, however, it should be determined that, notwithstanding the above criticism, this and the preceding cases are contradictory, then the number and weight of the authorities against *Lord Henley*'s opinion in the above case, united with the circumstance of it not appearing that any of the preceding authorities were mentioned in the argument of that case, or alluded to by his Lordship, would, as it is presumed, overbalance that single decision, and leave the rule settled by *Sir Francis North* and *Lord Hardwicke*, as before stated.

[Where a jointure has been made under a power, and the wife dying before the husband, he marries again; it seems that he may make a jointure on the second wife, unless the power be in such terms as not to admit of a construction applicable to more than one marriage (*a*).]

Powers to jointure in proportion to amount of wife's fortune.

When the power limits the amount of the jointure to be made with reference to the amount of the wife's fortune, in that case no larger sum can be appointed under the power than is in proportion to the value of the fortune actually and *bonâ fide* brought by her. There must be no contrivance, no fraud to augment such portion; for if, in order to make a large jointure under the power, a greater sum is paid to the husband than his wife's real fortune, which excess he repays; or if he endeavour by prior agreement to benefit himself by the appointment, as in *Lane* v. *Page* (*b*); in such

The execution will be good only to the extent of the actual and *bonâ fide* amount of the wife's portion.

(*a*) Hervey v. Hervey, 1 Atk. 561. Allanson v. Clitherow, 1 Ves. sen. 24. See Sugden on Powers, p. 525, 3rd edit.

(*b*) Ambl. 233.

and the like instances the execution of the power will be good *pro tanto*, and void as to the excess; for the fraud only affects a part of the transaction: such part, therefore, to which it does not extend, remains a valid execution of the power.

An instance of this species of limited power occurred in the case of the *Earl of Tyrconnel* v. the *Duke of Ancaster*, and the *Duke of Ancaster* v. *Lady Sherrard* (*a*). There the power was to enable the tenant for life to settle a jointure (which was of lands) not exceeding the clear yearly value of 100*l.* for every 1000*l.* that he should *receive* as and for his wife's portion. The fortune of his wife was 10,000*l.*; 8000*l.* of which he received, and the remaining 2000*l.* were settled to increase the portions of the younger children of the marriage, of which there were none. The husband, in consideration of the 10,000*l.* settled a jointure of 1000*l.* a year upon his wife, under the power. A question arose upon this execution, whether, since he in fact only *received* 8000*l.* of the portion, the power was well executed to the extent of 1000*l.* a year? And as the principles of the whole of the subject now under consideration are fully and clearly stated by *Lord Hardwicke* in his judgment upon this part of the case, it will be proper minutely to detail it in this place. "The first question," said his Lordship, "is upon the fact, whether *Sir B. Sherrard* (the tenant for life) is to be considered as having received 8000*l.* or 10,000*l.*? I am of opinion that he must, according to the nature of the thing, be considered as having received a portion of 10,000*l.* with his wife. On the marriage it was to be considered as that sum. But it is objected, that 2000*l.* part of the portion, was not received by the husband; so that, in consequence of the settlement, by his not surviving, it came back to his widow, there being no

(*a*) 2 Ves. sen. 500. Amb. 237.

younger children, and is therefore to be considered as no part of the portion upon which the jointure was made, and for that reason no jointure is to be made for it. But I am of opinion that objection does not hold. I agree, that where a jointure is to be made under such limited powers, of a portion to be *received*, the transaction must be fair, *bonâ fide*, without *fraud* and *collusion*; and therefore, if it be a *nominal*, not a real portion, that will not do. It often happens that a man marries a lady with a small portion, and he or his friends advance money to make up that a nominal portion, and take it back; that will not do. But that is not the present case. Parents create these powers with this view, viz. to compel their children to marry prudently with a wife of an adequate quality, certainly of an adequate fortune, and not to burthen the estate with a great jointure for a wife who brings nothing into the family, and who probably will not deserve it. Wherever, therefore, the portion of the wife is stipulated to be applied in a proper and reasonable manner, in the usual way of settling, for the benefit of the family, that is to be *considered* as a portion received. Not that the father meant that every part of this portion should be actually received by his son to spend or waste; that could not be the meaning. If, therefore, it be settled so as to come for the benefit of the family in the fair way of contracting and making settlements, that comes for the benefit of the husband and his family; and that is the present case. I consider what is fairly settled for the family comes to the benefit of the husband."

The transaction must be *bonâ fide*.

A nominal portion will not do.

But the wife's fortune need not to be paid to the husband; if it be settled for the benefit of the family, that is sufficient.

[A settlement of the wife's fortune to her separate use will not enable the husband to exercise a power of this description (*a*).

The power sometimes specifies in what manner the

(*a*) 2 Ves. sen. 501.

portion of the wife shall be settled. In a case (*a*) where it was directed that one-third should be settled on the eldest son, and one-third on the younger children, it was held to be a sufficient compliance to settle the two-thirds in trust for the husband for life and for the children after his death.

It was held in *Holt* v. *Holt* (*b*), that in estimating the amount of the wife's fortune, a part of it, which was not ascertained or reduced into possession during the husband's life, was not to be taken into consideration.]

No relief in equity against jointures for inequality.

It is customary, in a Court of Equity, to relieve parties against unconscionable transactions, when they can be restored to the same situation as they were at the period when such transactions took place. In instances where this cannot be done, the Court does not interfere; so that it will not give relief against marriage contracts for settlements, jointures, or other provisions, although they be very unequal, and in favour of the wife; for, as the Court cannot place the parties in the same situation in which they were prior to the marriage, it entertains no jurisdiction in the above cases.

Thus, in *Wicherley* v. *Wicherley* (*c*), where the person in remainder sought relief against a jointure made by the tenant for life upon his *death-bed*, in consideration and prior to his marriage by virtue of a *power*, it was refused by *Pratt*, C. J., *Lord Parker*, C., and the Master of the Rolls.

So, also, in *North* v. *Ansell* (*d*), the wife's portion was 500*l*, in consideration of which and of the marriage, the husband empowered his wife to dispose by will of 200*l*. She appointed that sum and died before him;

(*a*) Burrell v. Critchley, 15 Ves. 544. (*b*) 2 P. W. 648. (*c*) Cited, 2 P. Will. 619. (*d*) 2 P. Will. 618. 2 Eq. Ca. Ab. 209.

and although the husband stated that he had only received 300*l.* of the portion, yet, as the consideration for the power was the *marriage*, and he had acquiesced in the transaction for fifteen years, during which he lived with his wife, the Court ordered the money to be paid to the appointee, regardless of the consideration of the adequacy or inadequacy between the power and the portion (*a*).

Allegation of husband that he had only received part of wife's fortune not attended to, on the ground of acquiescence.

IV. I shall now proceed to the performance and satisfaction of covenants to make jointures.

Of performance and satisfaction of covenants, and the distinction between them.

This may be when the husband is under a covenant to settle a jointure of lands upon his wife, and he afterwards either does something in his lifetime, or permits something to happen after his death, from which the *law* presumes an intention that the act was done or the thing permitted to happen in *performance* of his obligation: or when the husband makes a disposition by his will in favour of his wife, without declaring it to be in satisfaction of his covenant or the jointure; but in that case, whether the devise be intended in discharge of his covenant depends upon an inference to be drawn from his own testamentary act by the judge, and is not created by the law as in the former case; the whole will is to be sifted to collect the inference of intention, and the result depends upon minute and subtle reasoning.

The distinction between a *performance* and a *satisfaction* appears from the above examples to be this, no particular expression of intention by the husband is necessary to be shown to make his act or permission a performance of his covenant, because the law presumes it, and therefore constitutes the performance. But a particular intent is necessary to be shown or inferred, that a thing *given* to or for the wife *by* her husband was meant by him a *satisfaction* of his covenant, the collection of which intention, when not expressed, has

---

(*a*) See Whitfield v. Paylor, Show. Parl. Cas. 20.

occasioned the nice distinctions and criticisms which are to be found in the books upon the subject.

In order to illustrate the above observations, I shall produce an instance of what is considered a *performance* and what a *satisfaction.*

If the husband be under a covenant to settle a jointure of lands upon his wife of a certain annual value, and he afterwards purchase lands and take the conveyance to himself in fee, and die without making the settlement, that purchase will be considered by the law as having been made in *performance* of the covenant.

But if, instead of leaving the law to decide upon the effect of the purchase in relation to the covenant to settle, the husband devise the lands to his widow, the question upon such a devise is one of *satisfaction* and not of performance.

The distinction between performance and satisfaction is necessary to be attended to, since in many cases that which will be a performance will not be a satisfaction. I shall first consider the authorities upon the doctrine of the performance of covenants for the settlement of *lands* in jointure upon the wife, and secondly, of the satisfaction of those covenants; postponing the consideration of the construction, performance, and satisfaction of the husband's covenants or agreements to leave or pay to or for his widow money, or part of his *personal* estate, in the event of her surviving him, to that division of this work which treats of the wife's interest in her husband's personal estate (*a*).

I. As to the performance of covenants or agreements by the husband to settle lands in jointure upon his wife.

1. What a performance of husband's covenant to settle, or to purchase and settle lands in jointure.

When the husband is under an obligation to settle lands in jointure, and having none, he makes a purchase, taking the conveyance to himself in fee, without

(*a*) Vol. ii. chap. 14.

making the settlement, in such and the like cases the purchased lands will be considered a performance of his engagement; upon the principle, that where a man covenants to perform an act, and does one which may be converted to a completion of such a covenant, the law presumes that he meant by so doing to perform his obligation (*a*). In this case, therefore, the heir will be a trustee of the descended lands for the widow, because they are bound by the covenant, unless the legal presumption that they were meant in performance of the covenant can be repelled by *evidence*, which it is presumed will be admissible for that purpose (*b*). But if the husband had lands at the time he entered into the covenant, and the covenant referred to none of them in particular, then (as it has been before shown) neither such lands nor the lands afterwards purchased would be holden by the heir as a trustee for the widow (*c*); the covenant not operating as a lien upon any of them. Yet if the covenant be so framed as to engage not only to settle, but to *purchase* and settle lands in jointure, then, although the husband may be seised of lands when he entered into it, if he make new purchases they will be considered in performance of his covenant, because the lands of which he was seised were not in the contemplation of the covenant, but those afterwards to be purchased, which brings the case within the general rule (*d*).

Parol evidence.

The legal presumption of performance is not to be rebutted by trivial circumstances.

Presumption of performance not rebutted by slight circumstances.

Thus if a covenant requiring lands to be purchased with the consent of other persons, be bought without such consent (*e*), or if the money is to be paid to trustees, to be laid out by them in purchasing lands;

(*a*) Tooke v. Hastings, 2 Vern. 97. Wilcocks v. Wilcocks, ibid. 558. (*b*) 10 Ves. 10. (*c*) *Supra*, p. 492. (*d*) 3 P. Will. 212; and see Lord Hardwicke's observations, 3 Atk. 327. (*e*) Lechmere v. Lechmere, 3 P. Will. 212. Cas. Temp. Talb. 80.

and the money is never paid to them, but the husband buys lands himself (*a*), or if such money be stipulated to be paid to them at a particular time to make the purchase, and instead of paying the money he, after a breach of his covenant, purchase lands; in these and the like cases, the purchases made by the husband will be a performance of his covenants or engagements; the fact whether they be made *in modo et formâ* required by the engagements being an immaterial circumstance. What has been said is illustrated by *Lord Eldon* in the following declaration:

"It is now *settled*, whatever may have been *Lord Thurlow's* difficulty, that if there be a covenant to purchase and settle lands upon the first and other sons in tail male, and the party purchases lands of *less*, *equal*, or *greater* value than the sum he covenanted to lay out, taking a conveyance to him and his heirs, and dies leaving a son, who would be tenant in tail under the settlement, and a grand-daughter by an elder son deceased, upon whom no settlement being made, the lands descend; that purchase would be not in all senses a performance, but a kind of mixed case, between performance and satisfaction, which would bar any demand against the assets of the grandfather (*b*)."

Part performance.

It appears, then, that although the lands purchased be *inferior* in *value* to the lands agreed to be settled, yet they will be considered a performance *pro tanto*, or a part performance of the covenant or agreement (*c*); in which respect the rules of performance and satisfaction differ, as it will be afterwards shown.

Purchase not a performance, unless the property will answer the purposes of the settlement.

[The presumption that a purchase is made in performance of the covenant does not arise, unless the property be such as will answer the purposes of the set-

---

(*a*) Ibid. and Sowden v. Sowden, 1 Bro. C. C. 582. 1 Cox, 165.
(*b*) 10 Ves. 9. (*c*) 3 P. Will. 212. Deacon v. Smith, 3 Atk. 323. Att. Gen. v. Whorwood, 1 Ves. sen. 540.

tlement. Thus where the covenant is to purchase and settle lands of inheritance in possession, a purchase of leaseholds for lives or years (*a*), or of a reversion (*b*), will not be deemed a performance. In one case it was said, that a reversion might be purchased with the intent of settling it, when it fell in (*c*); but the decree declared, that the estate not being in possession at the time of the purchase, was not to be considered as bought in pursuance of the articles. Lands of borough English tenure will not go in performance of a covenant to purchase lands of inheritance, the course of descent being different (*d*). If the settlement is to be made without impeachment of waste, a purchase of a copyhold estate will not be taken as a performance (*e*); and it seems that a purchase of copyholds will not, in general, be a performance (*f*), unless the covenant be couched in general terms applicable either to copyhold or freehold property (*g*).]

2. Satisfaction.

2. The second subject of consideration is, the *satisfaction* of the husband's covenant or agreement to settle, or to purchase and settle lands upon his wife in jointure, as also of the jointure when settled.

Satisfaction as distinguished from performance has been before stated. The former arises upon the act of the party in his lifetime to take effect after his death. The latter is an inference of law upon an act of the party complete during his life, as in the instance of a

---

(*a*) 3 P. W. 225. (*b*) Ibid. and Deacon v. Smith, 3 Atk. 323. (*c*) 3 Atk. 328. (*d*) Pinnell v. Hallett, Ambl. 106. (*e*) Ibid. (*f*) Attorney-General v. Whorwood, 1 Ves. sen. 541. See 1 Swan, 319. (*g*) Wilks v. Wilks, 5 Vin. Ab. 293, pl. 39. See also on the subject of presumed performance of covenants to purchase and settle lands, Bridges v Bere, 2 Eq. Ca. Ab. 34. Davys v. Howard, 6 Bro. Parl. Cas. ed. Toml. 370. Lewis v. Hill, 1 Ves. sen. 274. Belt's Suppl. 143. Lench v. Lench, 10 Ves. 511. Perry v. Phelips, 4 Ves. 108. 17 Ves. 173. Gardner v. Townshend, Coop. 301.

purchase before mentioned. Satisfaction is an inference of intention to be collected upon the party's disposition, as by will, whether he meant by the provisions contained in it for his widow to perform his engagements to her by articles or settlement (*a*); and that depends upon the construction of the will, and the intent to be collected from that instrument. It is also necessary to take into consideration the provision itself, and to compare it with that secured, or intended to be so, for the wife by the covenant or settlement.

Rule as to satisfaction.

It is therefore a general rule, that the thing given in order to be considered a satisfaction, must be exactly of the same nature, and equally certain and beneficial to the legatee or devisee, as that in lieu or substitution of which it is supposed to be given. This rule, however, is only applicable when the testamentary provision is not expressed to be a satisfaction; for if it be so declared, then the widow, without further consideration, is put to her election between the two provisions, in the same manner as between her dower and other provisions, a subject which has been considered (*b*); and so it is when there is no such declaration, but a Court of Equity is of opinion that, under all the circumstances, the testamentary disposition was meant in satisfaction of the husband's covenant or agreement (*c*).

Exceptions to it, when the thing covenanted to be done and the subsequent provision are *non ejusdem generis*, or when the latter is of a less amount than the former.

With reference, then, to the above rule it follows, that if the provisions by the settlement and the will be *non ejusdem generis*, the latter will not be a satisfaction of the former.

Thus, in *Broughton* v. *Errington* (*d*), the husband covenanted to settle, within three months after the marriage, an annuity of 1000*l*., to be issuing out of part of his real estates, upon his wife for life, if she were the

---

(*a*) See 1 Swanst. 219. (*b*) *Supra*, p. 469, *et seq.* (*c*) For instances of satisfaction, see "Law of Legacies," vol. ii. chapter 13. (*d*) 7 Bro. Parl. Ca. 461. 8vo. ed.

survivor, for her jointure. He afterwards by his will devised to her absolutely, a leasehold house, money in the funds, plate, linen, furniture, &c. He also bequeathed to her certain real estates which he had agreed to sell, also other monies which might be required to complete such purchase, all of which were to be so applied, and when the business was concluded, he directed the conveyance to be made to his wife's own use, and for her own absolute benefit. The testator died without having performed his covenant, leaving real estates of 8000*l.* a year. The net rental of the real property devised to the widow was 550*l.*, and the only stock of which the testator died possessed was 2000*l.* *East India* stock. The question was, whether the above devises were to be considered in satisfaction of the testator's covenant to settle upon his widow an *annuity* of 1000*l.*? The House of Lords decided in the negative, in affirmance of *Lord Bathurst*'s decree; and upon this principle, as it would seem, that the testamentary provisions were not of equal annual value with the annuity, and that the real estates, and the personal property bequeathed, were *non ejusdem generis* with the provision secured by the covenant, the former being *lands* and *gross* sums, whilst the latter was an *annuity*.

The last case seems to be an authority to this extent, that if the provisions be *non ejusdem generis*, and the latter be of larger gross amount than the value of that agreed to be settled, or if the testamentary provision be *inferior* in *annual* value to what is covenanted to be settled upon the widow, such subsequent devises will neither be a *total* nor a *partial* satisfaction of the covenant or agreement. Of the same complexion with the last is the prior case of *Eastwood* v. *Vinke* (*a*).

(*a*) 2 P. Will. 614, confirmed on appeal to the Chancellor. See also Probert v. Morgan, 1 Atk. 440.

There the husband gave a bond to a trustee with a condition, that if he at any time within four months settled freehold lands of the annual value of 100*l.* upon his intended wife for life, *or* if his heirs, executors, &c. should within four months after his death pay to her 2000*l.*, the bond was to be void. The husband by his will devised freehold and copyhold lands to his wife and her heirs of the yearly value of 88*l.*, and died within four months after the marriage, without having settled upon her lands of the yearly value of 100*l.* The question was, whether the devise of lands by the will was a satisfaction of the condition of the bond? The copyhold lands could not be so considered; and as to the freehold it was decided by the Master of the Rolls that they were not to be taken in satisfaction of it; and for these reasons, as it would seem, viz. that if the bond were forfeited, then as the obligation became a debt, a devise of lands not being *ejusdem generis*, the latter could not be a satisfaction of the former; on the other hand, if the agreement were to be considered to settle lands of the yearly value of 100*l.*, then those devised to the widow being of less annual amount than 100*l.*, could not for that reason be held to go in satisfaction of the engagement to settle lands of that full yearly value. The husband's executors, therefore, were ordered to pay the arrears of the 100*l.* a year, and to settle that annual sum upon the widow, the Court declaring, that she was not intitled to the 2000*l.*; and that the lands devised should not be taken in *part*-satisfaction of the 100*l.* agreed to be settled as before mentioned.

The reader will have observed, upon the perusal of the above authorities, that a Court of Equity will not presume an intention in the husband to satisfy his covenant or agreement for a jointure upon his wife by his testamentary disposition in her favour, unless the latter be in all respects equally beneficial to her, as her interest under such covenant or agreement. It is a consequence therefore, that if the lands stipulated to be

Or when the jointure is to

settled upon the wife in jointure be without impeachment of waste, and those bequeathed to her are without that privilege; or if the settlement is to be made to her in fee, and the devise is to her for life only, in these and such like instances the bequests will not be considered in satisfaction of her right under the covenant or agreement (*a*).

be settled *sans* waste, and the lands devised are subject to waste. Or when the former is to be in fee, and the latter is for life only.

The same rules which apply to the performance and satisfaction of the husband's covenants to leave or settle parts of his personal estate to or upon his wife, are equally applicable when the question arises upon the performance or satisfaction of his covenant to settle real estates upon her. For further particulars, therefore, on this subject, the reader is referred to the subsequent part of the treatise (*b*), where the interest of the widow in her husband's personal estate is considered; and I shall conclude this section with an instance where it appeared upon the fair construction of the husband's will, that he actually intended his widow to have, not only the provision made by their marriage articles, but also the testamentary provision which he had given to her.

Thus, in *Prime* v. *Stebbing* (*c*), the husband covenanted in marriage articles, that the lands settled upon his wife were of the yearly value of 1600*l.* above all incumbrances. He then made his will in this manner, "I do hereby *ratify* and *confirm* my marriage articles; and I do *also* give to my wife all my lands in *A B* for life." The lands in jointure were deficient in value, and the question was, whether the lands devised were not a satisfaction of such deficiency? *Lord Hardwicke* observed, that the husband could not intend to devise those lands as a satisfaction for what the wife was, in strictness of law, intitled to under the articles, but that

Instance of apparent intention that widow should have both her jointure and the lands devised to her.

(*a*) See Alleyn v. Alleyn, 2 Ves. sen. 38. (*b*) Chap. 14, section 3, 4. (*c*) 2 Ves. sen. 409.

he clearly meant them as an accumulated bounty, and that it was the same as if he had repeated every *iota* in the articles, and had declared that every clause in them should be performed, and then added, I *also* give her such lands.

We shall now proceed to consider,

V. The widow's interest in her estate settled in jointure, and the incidents, privileges, and powers belonging to it. Her alienation with her husband, either absolutely, or as a security for his debts, and what will be a bar or forfeiture of her jointure.

1. We shall for the present presume the interest which the wife takes in her jointure to be for life only (*a*). And as the two interests of a dowress and such a jointress bear a near resemblance, the reader is referred to the fourth section of the last chapter, where he will find the interest of tenant in dower in her estate, and the incidents and powers belonging to it are considered.

Jointress intitled to emblements.

Like tenant in dower the jointress is intitled to emblements, which will either pass by her will, or belong to her executor or administrator; but in the following respect they differ, viz. the jointress will not be intitled to the emblements upon the lands at her husband's death, because a jointure is not, as dower is, a continuation of the husband's estate (*b*).

May grant leases,

As incident to her estate for life, the jointress may grant leases for years, or a lease for her own life of the settled estate. And when the jointure is of a manor,

regrant copyholds,

as she is *domina pro tempore* she may regrant copyholds according to the custom (*c*).

(*a*) The widow's alienation to the prejudice of her issue of lands settled upon her *ex provisione viri*, will be considered in chapter xii. (*b*) Fisher v. Forbes, 9 Vin. Abr. 373, pl. 82. Also see the last chapter, sect. 4, p. 426. (*c*) See same chapter and section, p. 426.

The interest which the jointress has in the settled lands, enables her in like manner, as a dowress, to redeem incumbrances made prior to the commencement of her title, and to hold the estate until she be reimbursed. The proportion of her contribution with the owner of the inheritance, in respect of charges affecting her estate in jointure, is mentioned in the chapter and page referred to in the note (*a*).

and redeem prior incumbrances.

With respect to incumbrances, it is to be observed that the jointress claiming her estate under her husband, takes it subject to all charges to which it was liable in his hands at the time the settlement was made, and it is presumed that he cannot make a jointure upon his wife so as to give her title a precedency.

She is liable for incumbrances affecting the estate at time of settlement.

If, therefore, he be tenant in tail of either a *legal* or *trust* estate, and make a mortgage of it, or acknowledge a judgment or statute, and then levy a fine, and settle a jointure of the lands upon his wife, she will hold the property subject to those charges, because the estate tail was changed into a base fee by the fine, and barred the issue in tail, and that fee when acquired, although determinable upon a failure of such issue, strengthened the incumbrances, and let them in upon that inheritance according to their natures; so that they having a legal priority to the claim of the widow, she consequently can only take her jointure subject to those demands, and which she is intitled to redeem, as before is mentioned (*b*).

With respect to the wife's title to interest upon the arrears of her jointure, that subject has been already discussed (*c*).

Interest upon arrears of jointure.

The law so far protects the interest of the jointress,

Jointress not obliged to discover deed of jointure till her title be confirmed.

(*a*) Chap. ix, p. 372. See also 2 Ventr. 343. Carpenter v. Carpenter, 1 Vern. 440. (*b*) Goddard v. Complin, 1 Chan. Ca. 119. (*c*) *Supra*, p. 457, and see 3 Bro. C. C. 493. Forrest 2. 3 Atk. 579.

that she will not be obliged to discover the contents of the deed under which her estate in jointure is secured, until her title be *actually* confirmed by decree; so that the mere *offer* of confirmation will not be sufficient to obtain either such discovery, or the production of the instrument.

Thus in *Leech* v. *Trollop* (*a*), *Lord Hardwicke* said, he did not take it to be the practice of the Court of Chancery, that upon an *offer* to confirm a widow's jointure, the plaintiff was intitled to have the discovery by the *answer* upon that offer, but by the *decree*; "for suppose," said his Lordship, "that the plaintiff claimed to be tenant in tail, and offered to confirm the jointure upon discovery of the deed, and died, his issue in tail would not be bound by that offer; the act must, therefore, be *first* done, and not the discovery had by the answer upon that offer."

Wife's fine will pass her interest in jointure.

2. The law allows to the wife during the marriage the power either to pass and bar the whole interest in the lands settled upon her in jointure for her life, or to charge them in favour of her husband, by concurring with him in a fine. If the conveyance in which she concurs be absolute, the following distinction must be attended to in regard to the consequences of the transaction. If the jointure have been made *before* the marriage, and she join in such a fine, she will have extinguished her interest in the lands in jointure, and will be precluded from her title to dower in the residue of her husband's freehold estates; because that title was barred by the jointure, and the latter was extinguished by the fine; she cannot, therefore, claim either of them (*b*). But if the jointure had been made *after* the marriage, and the wife joined in such a fine, although

Difference to wife in such cases when the jointure is made *before*, and when *after* marriage.

(*a*) 2 Ves. sen. 662. See also 1 Ves. jun. 76; and Towers v. Davys, 1 Vern. 479. Petre v. Petre, 3 Atk. 511. Senhouse v. Earl, 2 Ves. sen. 450. (*b*) Co. Litt. 36 *b*.

she would be barred of her jointure, she might nevertheless claim her dower out of the other freehold lands of her husband; for the estate in jointure being in this case but a *conditional* bar of dower, viz. upon the wife's consenting to it after her husband's death, as it before appears (*a*), she may, notwithstanding the fine, disagree to the jointure, and elect to take her dower (*b*).

For the same reasons, if the transaction operated merely as a *charge* upon the estate in jointure for the husband's benefit, and the settlement were made *before* the marriage, by which the widow was deprived of her election between jointure and dower, she would be intitled to have the lands *exonerated* out of her husband's assets, as it has been before shown (*c*). But if the jointure had been made *after* the marriage, then she might evade the incumbrance, by waiving such settlement and electing to take her dower (*d*).

When wife's fine will not prejudice her.

But although the concurrence of a jointress in a fine will in general bar all her right and interest in and out of the settled estate (*e*), yet it may not have that effect in equity, for if it appeared to have been the intention of the husband and wife that her jointure or interest in the lands should not be affected by the fine, then as against him, and also against the conusee, if he had *notice* of such intention, the wife's jointure or interest will not in equity be prejudiced by such fine. As instances of these two points—

A jointure was settled upon a woman issuing out of some houses in London, which were burnt down; she joined her husband in a fine of them to create a long term for raising money to rebuild them: and it was adjudged that she should have her jointure out of the reserved rent of the houses, and that the fine did not

---

(*a*) See *supra*, sect. 1, p. 468. (*b*) Dyer, 358 *b*. 1 Bulstr. 173. 1 Leon. 285. (*c*) See chap. 4. (*d*) *Vide supra*, p. 415, et seq. (*e*) Pre. Ch. 333.

affect it (*a*). The Court there held, that as the fine was levied for a particular purpose, viz. to raise the term, it should enure to none else; and that the rent should not be subject to the husband's debts or charges since the jointure was made (*b*).

And in *Solly* v. *Whitfield* (*c*), the wife's jointure was an annuity of 50*l.* issuing out of particular lands. She and her husband levied a fine of those lands to a mortgagee, who had notice of the annuity, it being excepted in the mortgage. The Court decreed that the annuity was not extinguished by the fine, because it appeared that it was not the intention of the parties to destroy it.

Bar.

Fine by husband *alone* with proclamations may bar wife's jointure,

3. As to what will be a bar of the wife's jointure, besides her extinguishment of it by fine or recovery; if the husband alone levy a fine with proclamations of the settled lands, and the widow do not within five years after his death enter upon them, and proceed to avoid the fine in the manner mentioned in a preceding chapter (*d*), she will be barred of her jointure. But the wife being disabled during the coverture to relinquish or part with any interest in real estate, except by fine or recovery, (as it has been shewn) she cannot by any act in *pais* prejudice or bar herself of her title to her jointure: if, then, the jointure be secured by a bond, and she cancel or deliver it up (*e*), or otherwise than by fine or recovery, attempt to release or convey her

but no act of wife in *pais* during marriage will have that effect.

(*a*) Brend v. Brend, 1 Vern. 213. 2 Ch. Ca. 99. 161, *ante*, p. 155. (*b*) 1 Skin. 238. (*c*) Rep. Temp. Finch. 277. See also Naylor v. Baldwin, 1 Chan. Rep. 130, 8vo. ed. Cotton v. Cotton. ibid. vol. 2. p. 138. On this subject see also *ante*, chap. 4, sect. 3. The rules there laid down as to the effect of a fine of the wife's estate levied for the purpose of confirming a mortgage, are equally applicable to a fine of jointure lands. See 1 Bligh, 126, and Hill v. Bishop of Bristol, 2 Dick. 526. As to the effect of a fine, levied for a particular purpose, on the wife's right to dower, see post, chap. 11, sect. 3. (*d*) *Supra*, p. 64. (*e*) Beard v. Nutthall, 1 Vern. 427.

jointure in her husband's lands, such methods will be ineffectual for the purpose (*a*).

Forfeiture.

By wilful, or permissive waste.

4. When the jointure of the widow is for life, and it is not made without impeachment of waste, if she commit waste, that will be a forfeiture of her estate, for it is inconsistent with the nature of her interest, and ruinous to the owner of the inheritance. And it also seems, that she is equally answerable for *permissive* waste since the statutes of Marlbridge, 52 Henry the third, chap. 23, and of Glocester, 6th Edward the first, chap. 5, as appears from what has been said upon this subject in the last chapter (*b*).

By alienation.

If the jointress aliene the estate by a common law conveyance for a longer period than the term of her own life, that also will be a forfeiture. Suppose her, then, to grant a lease with livery for the life of the lessee; by such act she exposes herself to the loss of her jointure.

By acceptance of a fine, or confession in an action.

So also if she accept a fine *sur conusance de droit come ceo*, &c.; or if she confess an action brought by a stranger for the recovery of the inheritance, such acceptance and admission will incur a forfeiture of her jointure (*c*).

Not by elopement and adultery.

But the wife's elopement, and living in adultery with another man, will not be a forfeiture of her jointure, whether such provision be made by a complete deed, or be executory only, as by articles; in which latter instance, as it has been before observed, she may, notwithstanding such misconduct, compel a performance of them in a Court of Equity; because there is no law which deprives her of her jointure for the commission of that crime (*d*).

Nor by husband's felony or treason.

With respect to forfeiture arising from the misconduct of the husband, none of his acts can prejudice her

---

(*a*) Hob. 225. (*b*) *Supra*, p. 419. (*c*) *Supra*, p. 423; and see chap. xii. sect. 2. (*d*) Sidney v. Sidney, 3 P. Will. 269. Blount v. Winter, 3 P. W. 276, ed. by Cox. Seagrave v. Seagrave, 13 Ves. 439.

right to her jointure, for he can only forfeit that interest which belongs to him; so that neither his felony nor treason will affect her title to the property in settlement (*a*).

The widow's power over her estate in jointure by alienation, so as to prejudice her issue, is the subject of the twelfth chapter, to which the reader is referred.

(*a*) Co. Litt. 37 *a*; and see stat. 54 Geo. 3, c. 145.

CHAPTER XI.

HOW DOWER MAY BE PREVENTED OR BARRED BY OTHER MODES THAN JOINTURES.

HAVING in the preceding chapter fully entered into the considerations of jointures, the usual methods by which dower is prevented from arising, we shall proceed to consider by what other modes that title may not only be prevented, but barred and forfeited. This will be attempted in the following sections:—

I. *By limitations in purchase deeds.*
II. *By assignment of terms for years in trust for the purchaser.*
III. *By bars effected by husband and wife after marriage, viz.*
  1. *By husband and wife jointly, and the effect of his covenant that his wife shall join him in levying a fine.*
  2. *By the husband singly.*
  3. *By the wife singly during the marriage; and*
  4. *By her after marriage:—under which head will be considered the wife's acceptance of a collateral satisfaction under her husband's will.*

Limitations in purchase-deeds to prevent dower considered.

I. As to the limitations in purchase deeds in order to prevent the title of dower.

Many are the devices which have been invented for the purpose of barring dower; and, with the exception after mentioned, none have been found to answer the end proposed without being attended in other respects with hazard and inconvenience, as will appear in the sequel.

1. By creating a joint-tenancy.

The first limitation contrived to bar dower was "to

the purchaser and his trustee and *their* heirs; but as to the estate of the trustee and his heirs in *trust* for the purchaser and his heirs." The effect of that limitation was to vest a *legal joint-tenancy* in fee in the husband and his trustee, with the *beneficial* interest of the trustee's share in the purchaser. It has been before shown, that the widow of a joint-tenant is not intitled to dower (*a*); so that whilst that estate continued, no title to dower could arise; but this hazard attended the limitation, that if the husband survived his trustee, by which event he would become *solely* seised of the *legal* inheritance, the right of dower would have immediately attached to that seisin. This method, therefore, to exclude dower was defective.

2. A trust.

The improvement grafted upon that limitation, and suggested by the skill and ingenuity of conveyancers, was as follows, viz. "to the purchaser and his trustee, and the heirs of the trustee, in trust for the purchaser;" or "to the trustee and his heirs, in trust for the purchaser and his heirs." In the first case the joint-tenancy is continued, but the risk of letting in dower, if the husband were the survivor, is guarded against by vesting the *legal* inheritance in the trustee, and which observation is equally applicable to the second instance; so that the husband being seised of the *trust* of the inheritance only during the marriage, to which species of interest a right of dower does not attach, as has been before noticed (*b*), these improved limitations advanced one step farther towards the maturing a clause which might with safety be used in conveyances to purchasers, in order to exclude dower; but as to the first, so to the two succeeding limitations, serious objections arose. The trustee might die without an heir, and then the estate would escheat to the crown. Or suppose the trustee to leave an heir, that person might

---

(*a*) *Supra*, p. 366. (*b*) *Supra*, p. 354.

be a minor, a married woman, or a lunatic, &c. in which cases it might be difficult, and it would be expensive to procure from such person the proper conveyance of the *legal* fee-simple. Independently of these inconveniences, if the trustee made a will sufficient to pass his freehold property, it might be so uncertainly framed as to render a suit in Chancery indispensable to settle the question, whether the trust-estate did not also pass with his own property, which might be so devised as to make a fine or recovery, or even an act of parliament, necessary to procure a conveyance of the legal inheritance. The objections, therefore, to the adoption of these limitations, were such as to induce a perseverance in the attempt to frame a more eligible limitation in these cases. The vesting of the *legal* fee in a trustee was abandoned for the above reasons, and resort was had to the doctrine of powers and the statute of uses. The object now was to give to the purchaser full dominion *over* the *legal* inheritance, and at the same time to defeat his wife's title to dower. In order to effect this purpose a limitation was framed thus: "to such *uses* as the purchaser shall appoint, and until appointment, to the *use* of himself and his heirs;" or in this manner, "to the use of the purchaser for life, and after his death, to such *uses* as he shall appoint; and for want of appointment to the *use* of his right heirs."

3. By appointments under powers.

The principle upon which these limitations were considered a sufficient security against dower, was the purchaser's liberty, by executing his power, to defeat not only the fee of which he was actually seised, determinable by his appointment, but also, as it was supposed, his widow's right to endowment, which commenced with that seisin; for since the appointee claims the same priority as if he had been actually named in the purchase-deed, his title was supposed to over-reach the husband's seisin, and, as it was conceived, all rights and incidents annexed to it. But this effect of the appointment, so far as relates to dower, has been

doubted; because that title having once attached, it was supposed that the law would continue the right, and not suffer the husband by his *own act* to defeat it; also that it was not in his power to displace the title which, not he, but the *law created;* and that such a power and appointment did not resemble a condition annexed to the gift of an estate to the husband in fee (where the entry of the donor for a breach of the condition, by revesting in him his original estate, necessarily defeats *ab initio* the husband's seisin, with all its incidents, as it has been before observed (*a*)), but that the case was more analogous to the supersession or determination of his estate; where, although his interest ceases, still the right to dower continues; instances of which have been given in a prior chapter (*b*). In addition to this uncertainty as to the effect of the limitation, it was attended with danger, for if the power were destroyed (to which it is liable, by any act of the purchaser) there could be no question upon the right of his widow to endowment. This form, therefore, gave place to the two forms of limitations now in practice, which are "to such *uses* as the purchaser shall by deed, &c. appoint, and in default of appointment to the use of himself for life without impeachment of waste, and from and after the determination of that estate in his lifetime by forfeiture or otherwise, to the *use* of a trustee and his heirs, or his executors and administrators, during the purchaser's life in *trust* for him for life; and from and after the determination of the estate so limited in use to the trustee and his heirs, or his executors and administrators, during the purchaser's life,

The limitations now in use.

(*a*) *Supra*, p. 38. (*b*) *Supra*, p. 39, and see Cox v. Chamberlain, 4 Ves. 637, and Wilde v. Fort, 4 Taunt. 337—345; *sed vide* the dicta of Heath, J. in Cave v. Holford, 3 Ves. 657, and of Lord Eldon in Maundrell v. Maundrell, 10 Ves. 263—266. It has since been decided that the appointment defeats the wife's title of dower, Ray v. Pung, cited *ante*, p. 366.

to the *use* of the purchaser his heirs and assigns for ever." The other form is, "to such uses as the purchaser shall by deed or will appoint; and for want of appointment to the use of a trustee his heirs and assigns, or executors and administrators, during the life of the purchaser, in trust for him, and subject thereto, to the *use* of the purchaser his heirs and assigns (*a*)."

Their legal operation.

The legal effects of these two forms of limitations are these:—In the first of them, the husband is seised of a *remainder* in fee expectant upon his own life; the union of which two estates, and the consequent seisin of the inheritance, is prevented by the interposed freehold *pur autre vie* in the trustee; so that the husband is not *actually* so seised of the legal fee as to give a right to dower, as it has been before shown (*b*). In the second form of limitation, the husband takes only a trust estate for his life, the legal freehold *pur autre vie* being vested in the trustee, with remainder to the use of the purchaser in fee. The *trust* estate for life and the *legal* remainder in fee, being *non ejusdem generis*, cannot unite so as to vest the *actual* seisin of the inheritance in the husband, upon which a title to dower can attach; but in this, as well as in the other form of limitation, he has complete dominion over the inheritance, and he is secured against all the inconveniences before mentioned to attend the preceding limitations framed so as to prevent dower; and upon his death the *legal* estate of inheritance, if not disposed of, will descend to his heir.

II. On the necessity of the assignment of outstanding terms to a trustee for the purchaser, in order to prevent the widow's title to dower.

(*a*) The latter is the limitation now in general use, with some slight variations, as to which see Park on Dower, p. 83, *et seq.* Sugden on Powers, p. 195, note. (*b*) *Supra*, p. 360. For the form of a conveyance to uses to bar dower, see Append. No. 10, Vol. ii.

In a former chapter it was noticed that a widow was intitled to have an outstanding satisfied term removed out of her way by the aid of a Court of Equity, as against an heir or devisee, and that, if the term were not satisfied, she might redeem it and hold the estate until she was repaid the money she disbursed beyond her contributive share, and the consideration of her equity against a purchaser of the estate from her husband was postponed for consideration to this section (*a*). It will appear in the sequel, that the wife's equity is the same against the purchaser who neglects to secure himself against it by procuring an assignment of the term for his own benefit.

No distinction in equity between terms assigned and not assigned to attend the inheritance.

The reader will observe that there is no distinction in equity between a satisfied term outstanding and not expressly assigned to attend the freehold and inheritance, and a term so assigned; for although at law all terms are considered as terms in gross, so as that at law every existing term, without regard to the object for which it was created, prevents a dowress from having any legal benefit from her recovery in dower, whilst it continues, yet in equity the *purpose* for which the term was created and subsisting is regarded. When, therefore, the trust or purpose is satisfied, the ownership of the term belongs in equity to the owner of the freehold and inheritance, whether it be declared by the original conveyance to attend the inheritance or not.

Principle upon which widow is aided in equity against an heir or devisee.

The trustee holds the term for the benefit of the proprietor of the fee, it is considered a part of the inheritance, yet not merged, but so attendant upon the fee as to follow and accompany it, and every right and interest growing out of it either by *operation of law*, or by the agreement of the parties. When, therefore, dower arises, the term in a proportion is just as much attendant upon that interest growing out of the inhe-

---

(*a*) *Supra*, p. 372.

ritance during the husband's life. It is upon this principle that the heir, although he can avail himself of the term at law, is not permitted in equity to defeat by it the widow's claim to dower, for she having a certain quantity of interest in the inheritance, a Court of Equity considers her to have a correspondent interest in the term. Such is the widow's equity against the husband's heir or devisee (*a*).

The next inquiry is, concerning the widow's equity in this respect against a *purchaser* of the estate from her husband, where there is such a term.

If the husband be the only party to the conveyance nothing passes but the estate that he had, *i. e.* an estate of freehold and inheritance subject to dower. The same principle, therefore, which intitles the widow to relief against the heir, applies to the case of a purchaser, who stands precisely in the husband's place. Such, then, is the purchaser's title in regard to the freehold; and the circumstance of an outstanding term does not improve that title; for such a term accompanies the freehold and inheritance in the mode and manner in which it was attendant upon the same, *before* the inheritance was conveyed. The term being a mere accessary, the operation of the conveyance of the freehold upon it is purely derivative and consequential; and it is impossible that a greater interest can be *incidentally* acquired under the term than *directly* in the freehold. Hence upon principle as well as authority it may be considered as a general rule:—

And the same principle equally applies as against a purchaser.

That if a purchaser merely take a conveyance of the freehold and inheritance, and there being an outstanding satisfied term, he permits it to continue *in statu quo* during the vendor's life, his (the vendor's) widow, as incident to her title to dower in the freehold *prior* to the purchase, and her equitable interest in the term,

So that if he merely take a conveyance of the fee, the vendor's widow will be dowable notwithstanding the term.

(*a*) 7 Ves. 577, 578.

will be intitled to the assistance of a Court of Equity against such a purchaser, to prevent him setting it up at law in bar of her dower, or to the decree of that Court, for an assignment of her dower (*a*).

Since, then, the widow's interest in a term in respect of her right to dower, *prior* to the commencement of the purchaser's title, intitles her to a precedency to his claim under his purchase, it is obvious that his procuring an assignment of the term to a person in trust for him, cannot upon principle give to him any further advantage over the widow's right than he was intitled to previously to such assignment; yet it is firmly settled, that if he take an assignment of the term, it will protect him against the widow's title (*b*). The only solid ground for giving such an effect to the assignment is, the danger of shaking titles by denying that effect to an established mode of securing purchasers against the claims of dower (*c*).

Contra, if he procure an assignment of the term in trust for himself.

The purchaser will be equally protected although he have *notice* at the time of the assignment of the widow's title to dower. In this respect the widow is less protected than other incumbrancers; for the operation of an assignment in protecting subsequent against prior interests, depends upon the purchaser obtaining it *bonâ fide*, without notice of the title against which he sets it up; so that if the purchaser be affected with notice when he takes the assignment, it will be of no service to him as against prior incumbrancers. In order to illustrate this: suppose a mortgage to be made of the inheritance of an estate, that was subject to a prior mortgage, but of which the second mortgagee has no

And although he had notice of the title to dower.

(*a*) See Maundrell v. Maundrell, 7 Ves. 567. 10 Ves. 246. S. C.
(*b*) 2 Atk. 209. Lady Radnor v. Vanderbendy, Show. Parl. Ca. 69. S. C. 1 Vern. 179—356. 2 Freem. 211. Prec. in. Ch. 65. 2 Ch. Ca. 172. Swannock v. Lifford, Co. Litt. 208, *a*. Amb. 6. 2 Atk. 208. See the form of such an assignment, in Append. No. 11. vol. ii. (*c*) See the three cases last referred to.

notice, if he procure an assignment to a trustee for himself of a term satisfied, or a term not satisfied according to the later cases, he may protect himself against the first mortgage (*a*). But if he had notice of the first mortgage before payment of his purchase money, the assignment would afford him no protection, nor obtain for him any preference. In principle, there is no distinction between the above cases and that of dower, nevertheless, the authorities have determined that notice by the purchaser at the time he took the assignment, that the vendor's widow had a title to dower, shall not preclude his defeating by it such title (*b*). There being no rational principle for a distinction between the two cases, the authorities were founded upon the practice of conveyancers, and the general inconvenience which would have been felt by disturbing titles founded upon such practice. *Lord Eldon*, in *Maundrell* v. *Maundrell* (*c*), concluded his judgment upon this subject, in the following words:

"Upon the whole I mean not to say, for it is impossible to say with confidence, there is any great difference in *principle* upon the case of the dowress, that she stands as an owner of the inheritance contradistinguished from every other owner, so that notice of the title which will protect every other interest in the inheritance, shall not protect her; yet nothing shall protect her but the circumstance that the purchaser has omitted to take an assignment of the term to be attendant upon the inheritance *in that very transaction*, though the term has, in a prior transaction, been declared attendant upon the inheritance; but *Lord Hardwicke*, in the case of *Swannock* v. *Lifford*, takes the House of Lords to have so decided, upon the ground,

---

(*a*) Willoughby v. Willoughby, 1 Term Rep. 763. (*b*) Radnor v. Vanderbendy, and Swannock v. Lifford, before referred to. (*c*) 10 Ves. 272.

that in those very circumstances, and that precise case, the Court is bound, not by a *principle* upon which it can well reason, but by a *practice* of conveyancers found too inveterate, and that to that length it will go, and not farther."

A mortgagee is intitled to the same protection by the same means.

A mortgagee is a purchaser within this privilege: if, therefore, he procure the assignment of an outstanding satisfied term, it will protect his security from the dower of the mortgagor's widow (*a*).

Rule in these cases as laid down by *Lord Hardwicke.*

I shall conclude this section with a quotation from *Lord Hardwicke*'s judgment, in *Hill* v. *Adams*, reported in *Atkins* (*b*), under those names, but in *Ambler* (*c*), by the name of *Swannock* v. *Lifford*: "Since the case of *Radnor* v. *Vanderbendy*, it is a settled rule of the Court, that if a purchaser take in a term *precedent* to the right of dower, whether it be a satisfied term, or money paid for it, it is a bar to the wife's dower; but if the mortgage subsist at the husband's death, his widow may redeem and intitle herself to dower; or if the husband pay off the mortgage and take an assignment of the term to attend the inheritance, and die seised, his widow will also be intitled to dower; but that if a purchaser come in after the mortgage is paid off, and the *death of the husband*, and take an assignment of the term, such assignment will prevent dower (*d*)."

A term becoming vested in the wife, an assignment of it, to defeat her dower, compelled.

[In a late case (*e*) the husband was seised in fee subject to three terms of years vested in a trustee to attend the inheritance: the trustee dying, the terms became vested in the wife (who was his sister) as his administratrix. The husband became bankrupt, and his assignees having contracted to sell the estate, filed a bill to compel the purchaser to perform the contract,

---

(*a*) Wynn v. Williams, 5 Ves. 130. (*b*) 2 Atk. 209. (*c*) P. 6. S. C. Co. Litt. 208, note 1. (*d*) See also 1 Mad. 615, 617, 618. (*e*) Mole v. Smith, 4th April, 1822. Reported in a previous stage of the cause, 1 Jac. and Walk. 665.

and praying that the bankrupt and his wife might assign the terms in trust for the purchaser. The questions were, whether they could be compelled to assign, and whether the purchaser was bound to accept a title depending on the terms only as a protection against dower. During the progress of the suit, but after a decree for a reference of the title, and an inquiry as to the right to dower, the husband died. The Lord Chancellor decided in favour of the plaintiffs: he considered that if the husband had himself sold the estate he might have called upon his trustee to assign the terms to a trustee for the purchaser: his assignees had the same right as himself, and the widow could not stand in a better situation, because the ordinary had granted administration of the trustee's effects to her, when he might have granted it to another person.

A purchaser bound to accept a title protected from dower by a term.

If the term be assigned after the death of the husband, it seems to be open to doubt whether the effect will be to bar the wife's right to dower. The passage quoted above from *Lord Hardwicke*'s judgment in *Hill* v. *Adams*, if taken literally, imports that an assignment after the husband's death would be sufficient; but it has been suggested (*a*), that a word has been omitted by a typographical error, and that it should be read thus: "if a purchaser comes in after the mortgage is paid off, and *before* the death of the husband, and takes an assignment of the term, that will prevent dower." There seems to be great reason for this supposition: the alteration makes the language more correct, and renders the passage consistent with the report of the same case, in *Mr. Butler*'s notes to Co. Litt., according to which the observations of *Lord Hardwicke* apply throughout to the case of a purchase carried into effect during the husband's life. In *Wynn* v. *Williams* (*b*), where the assignment was

Effect of assignment of terms after the husband's death.

(*a*) See Mr. Coventry's note to Powell on Mortgages, vol. 1, p. 486. (*b*) 5 Ves. 134.

subsequent to the husband's death, it was held that the widow's right was defeated; but the point does not appear to have been particularly adverted to, and the case was involved in some specialties. In *Mole* v. *Smith* the decision was subsequent to the husband's death, but the suit had been commenced, and a decree made in his lifetime. A modern writer of distinguished learning, considers that the assignment in order to bar dower, must be completed during the coverture (*a*), and this opinion seems to be most consistent with the principle established by the case of *Maundrell* v. *Maundrell.* It is clear from that decision as well as from *Swannock* v. *Lifford,* that if the term be not assigned at the husband's death, the widow is intitled to claim her dower as against the purchaser; if so, she has then a preferable right to the benefit of the term, and supposing the purchaser to have notice, it would seem to follow that that right could not be displaced by the voluntary act of the trustee in assigning.]

III. With respect to bars of dower by husband and wife jointly, or singly, after the marriage:

1. What acts by them jointly will have the above effect.

Dower barred by the joint fine or recovery of husband and wife.

It has been shown, that a jointress may absolutely or partially convey or incumber her estate in jointure, by concurring with her husband in a fine or recovery (*b*). The same rule prevails in respect of her inchoate right to dower, although at one time her power to do so was doubted.

If, therefore, the husband and wife came in as vouchees in a common recovery, the voucher of the wife will extinguish her title to dower.

So also if the husband sell his estate and he and his wife join in levying a fine *sur conusance de droit come ceo,* &c. it will bar her right to dower; for there

---

(*a*) Preston on Abstracts, vol. 3, p. 380. (*b*) See p. 520.

could be no other reason for her concurrence in the above acts, than to destroy such right, since she had no other interest in the property; and the methods adopted for the purpose were sufficient (*a*).

Except levied or suffered for a partial purpose and the *ultra* use is not declared.

If, however, the fine be levied, or the recovery be suffered for a particular purpose, as to raise a term of years, or to create a charge upon the estate, the operation of the fine at law, as well as in equity, will be restricted to that partial object.

Suppose, then, the husband and wife to grant a rent out of the dowable estate by a fine, or to make a lease of it by the same mode, rendering a rent to the husband and his heirs; the effect of the fine will only be to suspend the title to dower during the continuance of such charge or lease (*b*); hence appears the necessity of declaring, that the use, subject to the incumbrance, shall enure to prevent dower in the usual manner; because in the case supposed, the use, in the absence of a contrary declaration, results to the husband in fee, in consequence of which, he becoming seised again of the inheritance, the right to dower immediately attaches upon it.

Effect of fine on right to dower when controlled in equity.

[If the declaration of the uses of the fine imports a grant of the fee, the wife's right to dower is absolutely barred at law; but if the fine was levied only to confirm a mortgage, and no further purpose be expressed, it seems that its effect will in equity be confined to that purpose, and that the wife will continue dowable subject to the mortgage. The language of *Lord Redesdale*, in *Jackson* v. *Innes*, implies that the effect of a fine levied by a wife having a title of dower, will in equity be controlled by the intention, in the same manner as that of a fine in which the wife joins, either because the estate belongs to her, or because she has a

---

(*a*) Plowd. 504—515. 10 Rep. 49 *b*. Touchst. 46. (*b*) Lampet's case, 10 Rep. 49, *b*.

charge by way of jointure (*a*), and several early cases recognize this principle (*b*). It follows from this principle, that if the deed indicates a purpose beyond that of creating the charge, and shows an intention that the right of dower was to be entirely relinquished, the wife will be barred, in the same manner as when she joins in a mortgage of her own estates, or of her jointure estate (*c*). In these cases there is still room for doubt as to what expressions in a mortgage deed will be considered sufficient to denote an ulterior purpose beyond that of making a security (*d*).]

Semble, that a subsequent declaration of the uses of the fine or recovery will not defeat dower.

But if the husband declare, by a subsequent deed, the uses of the fine to *A*, a purchaser, it may be asked, will *A* be intitled to the estate discharged of dower? I am not aware that this point has been decided, but it is conceived that, upon principle supported also by the opinions and practice of conveyancers, such a declaration will not defeat the title to dower which attached itself to the seisin acquired by the resulting use; because the operation of the fine is to give effect to the passing of the estate under and in point of interest from the date of the deed. The fine is the basis upon which the subsequent deed of declaration is founded, and the deed is the instrument *creating* the uses and estates, from the execution of which is to be computed the beneficial interests limited by it; and it is presumed that the law will not permit the doctrine of relation in such a case, *i. e.* it will not consider the persons claiming under the deed declaring the uses to take in the same manner, and with the like effect, as if the uses had

---

(*a*) 1 Bligh. 126. (*b*) Dolin v. Coltman, 1 Vern. 294. Danby's case, 2 Eq. Ca. Ab. 385, cited Prec. in Ch. 34. Naylor v. Baldwin, 1 Ch. Rep. 130. See also Jackson v. Parker, Ambl. 687. (*c*) Ante chap. 10. sec. 5. Chap. 4, sec. 3. (*d*) See a discussion of a question of this kind in Mr. Coventry's note to Powell on Mortgages, vol. 2, p. 679.

been limited to them when the fine was levied, since that fiction would be destructive to *bonâ fide* titles, attaching by law and by contract, to the seisin and ownership of the husband, acquired by the use which resulted to him after the fine was levied (*a*).

If husband *alone* declare the uses of an intended fine or recovery, which is afterwards levied or suffered by him and wife, she will be bound and barred of dower.

If the uses of a fine or recovery be declared by the husband *alone*, *before* it be levied or suffered, and he and his wife join in the fine or recovery, her dower will be extinct; for that was the necessary consequence of her concurring in those acts, and the revival of her right to dower was prevented by the declaration of the uses, which, although done by the husband alone, was nevertheless binding upon his wife, and therefore excluded a resulting use to him, which, as it has been shown, would have intitled her to dower. In fact the wife, by joining in the fine or recovery, consented to the uses previously declared of it by her husband; the fine or recovery, and the instrument *leading* the uses of it, being considered as one and the same transaction (*b*).

Dower barred by alienations of husband and wife under conveyances founded on particular customs.

By the *lex loci*, the wife may destroy her title to endowment by other methods than by fine or recovery. Accordingly, by the custom of the city of *London*, a bargain and sale acknowledged before the Lord Mayor, or the Recorder and one Alderman (the wife being separately examined), and proclaimed and enrolled in the Hustings Court, will bar dower (*c*). So also a recovery by writ of right in the same Court, will have the like effect (*d*).

(*a*) But see ante p. 141, and Swanton v. Raven, cited there, from which it appears that a subsequent declaration of uses by the husband alone, will, unless the wife dissents, bind her, even as to her own estate.

(*b*) Haverington's case, Ow. 6. Beckwith's case, 2 Rep. 57, *a*. ante p. 141. (*c*) Hughes' writs. Stat. 34 and 35 Hen. 8. c. 22 (*d*) Lusher v. Banbong, Dy. 290, pl. 61. Beckwith's case, 2 Rep. 57 *b*.

Fine if not completed before husband's death, will not preclude wife's title to endowment.

In the preceding observations, the *completion* of the fine or recovery by the husband and wife, was assumed: if, however, the husband die before the essential ceremonies be begun or finished, the widow may secure her dower by refusing to concur in the proceedings. Thus in *Hody* v. *Lunn* (*a*), the husband, upon sale of his estate, *covenanted* that he and his wife would levy a fine, as of a future term. The husband died before the term, and the purchaser sought relief in equity against the widow's dower; but it was adjudged, notwithstanding she had received a part of the purchase-money, that the purchaser could not be relieved, because it was a maxim that a married woman could not be bound or barred of her right without a fine, and none such had been levied in the present instance.

Whether the husband's covenant to procure his wife to concur in a fine, will be enforced in equity.

This introduces a subject upon which a diversity of opinions exists; viz. as to the effect of the husband's covenant or agreement that his wife shall join with him in levying a fine, and whether a Court of Equity will compel a specific performance of such a covenant or agreement. In order to arrive at any conclusion upon this subject, it is necessary to consider the authorities.

In *Hall* v. *Hardy* (*b*), an award was made by arbitrators, ordering the husband to procure his wife to levy a fine; and *Sir Joseph Jekyll* decreed to that effect, and said, "That there had been a hundred precedents, where, if the husband for a *valuable* consideration covenanted that his wife should join with him in a fine, the Court had decreed the husband to do it, for that he had undertaken so to do, and must lie by it if he did not perform it."

In *Barrington* v. *Horn* (*c*), a similar decree was pronounced by *Lord Cowper*; and the reason assigned was, because the husband had taken upon himself, for

---

(*a*) 1 Roll. Abr. 375, pl. 20. (*b*) 3 P. Will. 187. (*c*) 5 Vin. Abr. 547, pl. 35. 2 Eq. Ca. Ab. 17. pl. 7.

a *valuable* consideration, to procure his wife to concur in a fine, upon the credit of which covenant the purchaser paid the money.

Withers v. *Pinchard* (*a*), was a case in which the husband, for himself and wife, agreed to sell an estate, half of which belonged to her: the estate had been settled to uses, with a power of revocation in the husband and wife, with the consent of the trustees. The wife, in her answer, declared (which was affirmed by her husband), that she never consented to the sale; and both of them stated their belief that the trustees would not consent to a revocation of the uses. The Chancellor decreed a specific performance, and that the husband should convey and procure all proper parties to convey, as the Master directed, if the parties differed about the conveyance (*b*).

And in *Morris* v. *Stephenson* (*c*), husband and wife being seised of freehold and copyhold estates to the use of the wife for life, remainder to the use of the husband

---

(*a*) Cited 7 Ves. jun. 475.

(*b*) It appears from the pleadings, as stated in the Register's Book, that one undivided moiety had been settled to the use of the husband for life, with remainder to the wife for life, with remainder to trustees to sell and divide the produce amongst the children of the marriage, with a power for the husband and wife to revoke the uses with the privity and approbation of the trustees. The Bill was filed by the purchaser against the husband and wife: the decree declared that the agreement ought to be specifically performed, and referred it to the Master to settle a conveyance; and it was ordered that the defendant should procure his wife and such of the parties as the Master should think fit to join in the conveyance; and upon the execution of the conveyance, the plaintiff was to pay the purchase-money to the defendant. The defendant was ordered to pay the costs. Reg. Lib. B. 1794, fo. 647. Unless there were other circumstances in the case, it is difficult to account for this decree: the effect of it was to render the husband liable to process of contempt in case the trustees should not happen to approve of the sale.

(*c*) 7 Ves. jun. 474.

for life, with remainder to such uses as they or the survivor should appoint, by deed dated the 18th of June, 1799, revoked the old, and appointed new uses; the husband covenanting for himself and wife, with her consent, that both of them should within a month surrender the copyholds to Stephenson and his partners, upon trust to sell, and to pay a debt owing by him to them, and to apply the surplus according to the appointment of himself and wife. This deed was executed by the wife: a sale was made, and a bill, filed by the wife, to set it aside, on the ground of fraud, was dismissed. Upon another bill, filed by *A* and *B*, against the husband and wife, for a specific performance, they, by answer, insisted upon the old ground of fraud, but of which there was no proof; and the Master of the Rolls decreed that the husband should specifically perform the covenant, and *procure* his wife to join in a surrender (*a*).

It is presumed that the above authorities are sufficient to establish the general proposition, that the husband is bound in equity to perform his covenant, founded upon a valuable consideration, to procure his wife to join with him in a fine or other conveyance.

(*a*) It appears by the Register's Book, that Stephenson and his partners had sold the estates to Seaman and Kerrison, who joined with them as co-plaintiffs, stating that they were willing to complete their purchase on having a good title made. The decree declared that the covenant contained in the deed of June 1799, on the part of Morris, ought to be specifically performed. The defendant Morris was ordered to surrender the premises to Seaman and Kerrison and their heirs, or otherwise as Stephenson and his partners should direct in pursuance of the trusts of the deed, and to procure his wife to join in the surrenders of the copyhold premises, and to surrender all her estate and interest therein, pursuant to his covenant. The plaintiffs Stephenson and his partners were to retain out of the purchase-money, their debt and costs, and in the next place to pay thereout the costs of Morris and his wife and her next friend, and to apply the surplus (if any) pursuant to the deed of June 1799. Reg. Lib. B. 1801, fo. 1035.

The case of *Preston* v. *Wasey* (*a*), which has been considered as contrary to the principle of the above authorities, appears, from the report, to have been decided upon the ground of fraud: and *Daniel* v. *Adams* (*b*), another of those cases, appears to be one in which neither the husband nor his wife could be bound; for there the authority given to an agent, was to sell certain lands, by *public auction*; but he, mistaking his power, sold them by *private* contract.

The only case with which I am acquainted, that appears to militate against the four first before referred to upon this subject, is *Otread* v. *Round* (*c*). There the husband and wife, for a valuable consideration, by lease and release conveyed the wife's lands in fee, and the husband covenanted that she should *levy a fine* of them to the use of the *purchaser*. The wife afterwards *refused* to do so; upon which the purchaser filed a bill for a specific performance of the covenant. The husband, by answer, admitted the covenant, and said that *he* was ready to levy a fine, but that his *wife refused* to join with him, and that he *could not persuade* her to do so. And *Lord Cowper*, who decided the before mentioned case of *Barrington* v. *Horn*, observed, that it was a tender point to compel the husband, by a decree, to procure his wife to levy a fine, although there had been some precedents in the Court for it; and that it was a great breach upon the wisdom of the law, which secured her lands from being aliened by her husband without her free consent, to lay a necessity upon her to part with her lands, or otherwise to be the cause of her husband's lying in prison all his days; and his lordship declared, that he did not in *that case* think it proper to decree a specific performance of the covenant, but that the husband must refund the purchase-money which he had received, with costs.

(*a*) Pre. Ch. 76. (*b*) Ambl. 495. (*c*) 4 Vin. Abr. 203, pl. 4.

From the tenor of the above judgment, it may be inferred that *Lord Cowper* did not mean to deny that the husband was in general liable to perform *in specie* his own voluntary engagement that his wife should levy a fine, but that the particular circumstances of that case formed an exception; especially as the parties could be placed in the same situation as they were previously to the transaction. These circumstances are happily enumerated by *Sir William Grant*, in his allusion to the case in that of *Morris* v. *Stephenson*, before referred to. "The husband," said he, "does not allege that he is unable to procure his wife to join; he does *not* offer to pay the debt; and *it is impossible for him to put the plaintiffs in the same situation* as if the deed never had been executed; for they would in 1799 have had an execution against him, if he had not redeemed himself by giving this security. It is unnecessary, therefore, to discuss *Lord Cowper*'s reasoning, this case being so extremely dissimilar to that, this *differing in all its circumstances.* The defendant *there* stated *absolute* inability to perform, *and offered* to put the other party in the same situation as if the agreement had never taken place." In reference to *Lord Cowper*'s observations upon the hardship of throwing the husband into prison, or imposing necessity upon the wife to comply with her husband's request, his Honour added, "That there are many other ways in which a wife would be under compulsion, and yet it would be quite impossible to abstain from enforcing the demand against the husband: the effect would have been just the same (in the case before him) if she had originally refused; the creditor would have thrown her husband into prison, and there would have been the same necessity upon her. If, therefore, there be any thing in that reasoning, in the instance of a voluntary sale by the husband, it would *not*, perhaps, hold, where the object is to redeem himself from the demand of a creditor having that power over him."

I am aware that in *Emery* v. *Wase* (*a*), *Lord Eldon* expressed doubts upon the Court's exercising its power to compel the husband to procure the concurrence of his wife in enabling him to perform his covenants and engagements on her behalf, but his Lordship pronounced no decision upon the point; and if the authorities first before referred to be considered of weight, it is presumed that they have established the general proposition before stated. The principle does not appear harsh or unsound: the husband ought to know the state of his wife's mind before he enters into such stipulations; and with the exception when it appears that the wife will not concur, and the husband can replace the purchaser in the same situation as he was previously to the transaction, it may probably be considered, that the Court will decree a specific performance by the husband of his covenant that his wife shall concur with him in levying a fine (*b*).

(*a*) 8 Ves. jun. 514.

(*b*) The question whether a Court of Equity will enforce against an husband a specific performance of an agreement that his wife shall levy a fine, has been the subject of much difference of opinion. Upon principle there are strong objections to the jurisdiction. A Court of Equity does not, in general, decree that a party shall specifically perform his agreement, unless it be one which he is legally competent to perform himself, or unless it can be performed by others whose concurrence he has by law a right to require. Thus if a man agrees to sell an estate which does not belong to him, or if a tenant for life agrees to sell the inheritance, a specific performance will not be decreed, but the purchaser will be left to recover damages at law. Crop v. Norton, 2 Atk. 74. See Harnett v. Yielding, 2 Sch. and Lef. 549. Lord Redesdale has stated the doctrine on this subject to be, that "when a person undertakes to do a thing which he can himself do, or has the means of *making* others do, the Court compels him to do it, or procure it to be done, unless the circumstances of the case make it highly unreasonable to do so." 2 Sch. and Lef. 166. The husband has not by law the means of making his wife concur in a fine; he has by law no more power over her estate, than a tenant for life has over the estate of the remainderman. The argument that a man who contracts to sell

The extent of the wife's powers to dispose of real and personal estates as a feme sole, under her husband's

---

the estate of his wife ought previously to ascertain whether she is willing to join, applies equally to the case of one who contracts to sell the estate of a third person, and may be in either case a ground for giving damages against him at law, or for compelling him to place the other party in the situation in which he was previously to the contract. But upon the question whether a specific performance of such contracts shall be decreed, the only distinction between the two cases is, that in the former he may have greater influence over the person whose concurrence is necessary, and that there may, therefore, be a greater probability of his being able to complete his agreement. It must, however, be a matter of uncertainty whether his influence will be sufficient, and the mere probability that he may be able to procure her assent can scarcely be deemed a ground for decreeing absolutely that he shall do so. It may be doubted also whether it is a wise exercise of the discretion of a Court of Equity, to make a decree which in effect declares, that a husband ought to employ his influence over his wife, to induce her to part with her property for his benefit.

In Morris v. Stephenson, the judgment of the Master of the Rolls was, in a great measure, founded upon the circumstance that the husband did not allege himself to be unable to procure his wife's assent. But if after a decree for a specific performance of such an agreement, it should appear that the husband was in fact unable to prevail upon his wife to concur, it could not be contended at this day that he should be condemned to perpetual imprisonment. See 5 Ves. 848. Even in cases where, according to the general practice, the husband is liable to process of contempt for the defaults of his wife, he is excused, upon shewing that it is not in his power to influence her. Lloyd v. Basnet, 1 Dick. 143. Barry v. Cane, 3 Madd. 472. Hence if the wife persists in refusing, the consequence is that the decree becomes merely nugatory.

Independently of these considerations, there is great reason for contending, that a person entering into a contract of this description with a husband is not entitled to the aid of equity to enforce it, so far as it depends upon the wife's assent. "The policy of the law," says the Lord Chancellor, "is, that a wife is not to part with her property but by her own spontaneous and free will. If this was perfectly *res integra*, I should hesitate long, before I should say, the husband is to be understood to have gained her consent, and the presumption is to be made, that he obtained it before the bargain, to avoid all the fraud, that may be afterwards practised to procure

agreement, will be considered in those parts of this work which treat upon property given or settled to her

---

it. I should have hesitated long in following up that presumption, rather than the principle of the policy of the law; for if a man chooses to contract for the estate of a married woman, or an estate subject to dower, he knows the property is hers altogether, or to a given extent. The purchaser is bound to regard the policy of the law; and what right has he to complain, if she who according to law cannot part with her property but by her own free will, expressed at the time of that act of record, takes advantage of the *locus pœnitentiæ*, and why is he not to take his chance of damages against the husband?" 8 Ves. 514.

When a contract of such a nature is entered into, it cannot be understood as an absolute engagement that the wife shall be obliged to join, whether she be willing or reluctant; for such a contract would be contrary to the policy of the law, which requires that her consent shall be freely given. The purchaser is aware that the matter depends upon the pleasure of the wife: he contracts only for the chance of her free option. Can he then call on a Court of Equity to exert its powers for the purpose of indirectly controulling the freedom of her choice?

Some of the cases seem to have proceeded partly upon the fact of the wife having herself been a party to, or having assented to the agreement, or upon a presumption that she had assented. But if it be law that the agreement of a feme covert is void, it is difficult to find any principle upon which her assent or dissent at the time of the contract could vary the case. See 8 Ves. 516. 2 Jac. and Walk. 424.

It must be admitted, however, that there are many cases in favour of the specific performance of such agreements. See, besides the references in the text, Berry v. Wade. Finch. 180. Voux v. Gleas. Toth. 92. Rust v. Whittle, ibid. 94. Griffin v. Taylor, ibid. 106. Wheeler v. Newton, 2 Eq. Ca. Ab. 44. pl. 5. Prec. Ch. 16. Baker v. Child, 2 Vern. 61. Clark v. Greenhill, 1 Dick. 91. But it may be observed, with respect to most of these cases, that they were decided at a period, when the Courts exercised a much greater latitude than at present in questions of this kind. Thus it would seem, from the language of the reporter, that in some instances the decrees were made against the wife personally. Barty v. Herenden, Toth. 93. Sands v. Tomlinson, ibid. In one case it was decreed that a man should compel his wife, *and another man's wife*, to levy a fine. Rust v. Whittle, *ub. sup.* In another, a father was decreed to per-

separate use, and of her powers of disposition over the same.

---

form an agreement for procuring his son to join in a conveyance. Anon. 2 Ch. Ca. 53. And in one case it is said to have been held, that if a feme covert agrees with her husband to levy a fine, she shall after his death be compelled to perform the agreement. Baker v. Child, *ub. sup.* Since the limits of the jurisdiction of Equity in the specific performance of agreements, and the rules as to the disabilities of coverture, have been more clearly settled, these early cases cannot now be received as authorities, without some qualifications.

The case of Otread v. Round (cited *supra)* is a strong authority against the interference of equity to compel the performance of the husband's agreement that his wife shall levy a fine. The question was shortly afterwards raised in Bryan v. Woolley, 1 Bro. Parl. Cas. Toml. p. 184. It does not appear from the report in Brown upon what ground the case was decided, but in Lord Harcourt's note the result of it is stated thus: "No agreement of the husband to part with the wife's inheritance shall bind the wife, or be carried into execution," 4 Vin. Ab. 57. pl. 19. 1 Madd. 7. n. Gilbert lays it down, that if a purchaser files a bill against the husband and wife for a specific execution of the agreement, and the wife upon private examination consents, the Court will decree it. He adds: "But quære whether the Court will decree it if the Bill be preferred against the husband only; because if the Court should compel the husband, the husband would compel the wife who is under his power, and the wife ought not by law to convey by means of any compulsion from her husband." Lex Prœt. 245.

To these authorities may be added the observations of several modern judges strongly disapproving of the old doctrine on this subject. See Daniel v. Adams, and Emery v. Wase, cited *supra*, and 8 Ves. 848. Davis v. Jones, 1 New. Rep. 269. Howell v. George, 1 Madd. 1. Martin v. Mitchell, 2 Jac. and Walk. 425. In Cooth v. Jackson, 16 Ves. 367, the point was noticed by the Lord Chancellor as still doubtful.

If the contract is not decreed to be performed, the purchaser may according to circumstances be left to recover damages at law, or the Court may rescind the contract, imposing on the husband such terms as may be reasonable. See 1 Sch. and Lef. 168. Thus in Otread v. Round, the husband was decreed to repay the purchase money.

In Sedgwick v. Hargrave, 2 Ves. sen. 56. Belt's Supp. 270, a

Having considered how the widow's title to dower may be defeated or extinguished by her and her husband's joint acts, as also by the effect of his covenant that she should concur in a fine, the next subject proposed to be treated upon, was

What acts of husband will forfeit dower. Treason. Petit-treason.

2. What acts of the husband singly will defeat his wife's right to dower.

The treason, or petit treason, of the husband, of which he is attainted, was a forfeiture of his wife's title to dower at common law; and the rule was the same when he was attainted of felony by outlawry or otherwise (*a*). This rule being considered too severe, upon the principle that the innocent ought not to be punished for the guilty, it was enacted by statute 1 Edward VI. c. 12, section 17, that the attainder, conviction, or outlawry, for any treason, petit treason, murder, or felony whatsoever, committed by the husband, should not operate as a forfeiture of his wife's dower. With respect to treasons and petit treasons, that act was repealed by another statute of the 5th and 6th of the same king's reign (*b*); and so the law remains at present, with the exception of some modern treasons, made by particular statutes, relating to the coin of the

---

sum of money had been paid to the husband as a compensation for the relinquishment of his wife's interest in an estate. On their refusing to convey, a bill was filed against them. The Master of the Rolls observed that he could not make a personal decree against the wife, and he feared that a bare decree for the husband to convey and procure the wife to join might not answer the ends of justice. He, therefore, decreed in the alternative, that the husband should execute proper assurances and procure his wife to join, and that if he did not, he should refund the money and pay the costs of the suit.

In cases, where the wife has only a partial interest in the estate, as jointure or dower, the purchaser might be allowed to take such title as the husband can give, deducting from the purchase money a compensation for the wife's claims.

(*a*) Fitz. Nat. Brev. 150. I. Perk. sect. 308—387. Co. Litt. 41.

(*b*) Chap. 11, sect. 13.

realm, which expressly save to the wife her title to dower (*a*). And it is conceived, that notwithstanding the exception in the statute of the fifty-fourth year of the reign of the late king (*b*), the widow's right to dower will not be forfeited or escheated by her husband's attainder for any other felony; the intention of the act being to remove, not to extend the legal corruption of blood of the offender. The wife, therefore, being intitled to dower under the above two statutes of Edward the sixth, notwithstanding her husband's attainder for any less offence than treason or petit treason, it is presumed, that although he be convicted of murder, &c. yet his widow will be intitled to her dower (*c*).

Not his commission of a less offence.

It is observable, that even after the attainder of the husband for treason, his widow would have been intitled to dower if the acts of the 7th of Anne, and the 17th of George the second (*d*), had been permitted to continue; but both of them were repealed so far as it was provided that after the death of the late Pretender and his sons, no attainder for treason should extend to the disinheriting of any heir, nor to the prejudice of any person other than the offender himself (*e*).

Attainder, when incurred.

Attainder is the effect of the *judgment* pronounced upon the culprit, and not of his *conviction*. If, therefore, he die before judgment, there will neither be a corruption of blood, nor a forfeiture or escheat of the lands; so that the widow's title to dower remains uninjured (*f*).

The attainder, though followed by pardon, will defeat dower of lands which the husband was seised of prior to such pardon.

As the wife's dower is a continuation of her husband's estate, a title which she derives from him, and in respect of his seisin, it seems that the effect of his attainder for treason, or petit treason, will *estop* his

---

(*a*) 5 Eliz. c. 11, sect. 4. 18 Eliz. c. 1, sect. 2. 8 and 9 Will. III. c. 26, sect. 7, and 15 Geo. II. c. 28, sect. 4. (*b*) Chap. 145. (*c*) See Co. Litt. 392 *b*. (*d*) Chap. 39. (*e*) 39 Geo. III. c. 93. (*f*) Co. Litt. 390 *b*. 391.

widow from claiming dower, not only of all lands which he was seised of at the time of the attainder, but of those also which he had disposed of after the marriage, and before such attainder; because the estoppel is equally conclusive with respect to the estate aliened, as to that of which the husband was seised at the period of his attainder; for in each instance the widow must derive her title from her husband, a person whom the law, under such circumstances, disables from communicating any right or title. The case will be the same as to all those lands, although the husband obtain a pardon; the widow's title to dower will still be defective, for the effects of the attainder in regard to titles to be made to or out of lands which the husband was seised of previously to the pardon, remain the same as if such pardon had not been granted (*a*).

Accordingly, in *Mayne*'s case (*b*), *Mayne* being seised of lands in fee, married, and made a feoffment in fee to a stranger; he afterwards committed treason, was convicted, obtained a charter of pardon, and died. His widow claimed dower against the feoffee; but the Court of Exchequer decided against the claim, *Manwood,* Chief Baron, expressing himself thus: "By reason of this attainder, dower cannot accrue to the wife; for her title begins by the intermarriage, and ought to continue and be consummated by the death of the husband; which cannot be in this case, for the attainder of the husband has interrupted it, as in the instance of an elopement; and this attainder is an universal *estoppel,* which does not run in privity only between the wife and him to whom the escheat belongs, but every stranger may bar her of her dower by reason thereof; for by the attainder of the husband, his wife is disabled to demand dower, as well as to demand his inheritance;" and he cited *Gate*'s case (*c*), a resolution

---

(*a*) See *supra,* pp. 46. (*b*) 1 Leon. 3, pl. 7. (*c*) Gate v. Wiseman, Dy. 140 *b*. Co. Litt. 41 *a*.

of all the justices of *England;* and added, that the charter of *pardon* did not help the matter, since the same extended but to the life of the offender, and did not remove the attainder, by which the widow was barred to demand dower during its continuance.

But not of lands acquired after the pardon.

But this doctrine must be confined to lands of which the husband was seised prior to the period of the grant of the pardon; because from the time of the pardon, the husband in a legal sense becomes a new man; he may purchase lands, and hold and enjoy them; they will descend to his heir at his death, and consequently his wife's title to dower will attach to them, as in the ordinary cases before detailed (*a*).

Perkins lays down the law upon this subject as follows; "If, after attainder, the husband purchase a charter of pardon, now of all such estates of inheritance whereof her husband is seised *after* the purchase of his pardon, which inheritance the issue that by possibility he might have by his wife, might by possibility inherit by the common law, she shall have dower. For notwithstanding she was his wife at the time of the attainder, yet the issue which the husband might have had by her *after* the purchase of his charter of pardon are inheritable (*b*)."

Reversal of husband's attainder will restore wife's title to dower.

If the attainder be reversed for error, either by the husband or his heir, in such cases the widow's title to dower will revive, since the cause of her estoppel being removed, and the interest of her husband restored to the same state in which it was before the judgment pronounced against him, all the consequences of that judgment must fall with it (*c*). And if Parliament think proper to reverse the attainder, the effect upon the widow's title to dower will be the same (*d*).

Husband's sole fine with proclamations will bar dower unless widow enter within five years after his death.

The husband may also bar his wife's title to dower by levying a fine with proclamations of the dowable

---

(*a*) Co. Litt. 392. (*b*) Perk. sect. 387. (*c*) Menvil's case, 13 Co. 19. Moor. 639. (*d*) 4 Black. Com. 392.

estate, for if she do not exert her claim within *five* years after his death when she became discovert, her right will be destroyed (*a*); for during the marriage her right was saved by the act of the 4th of *Henry* the seventh, chap. 24; but when the coverture was dissolved by her husband's death, then her title to endowment was consummated, and no impediment occurred to her exertion of it, under which circumstances the bar by the statute commenced from that period. But if the wife be a minor at her husband's death, or in prison, or out of the country, or insane, when the fine was levied by the husband alone, her right is saved by the statute till such disabilities be removed, from which periods the widow will have five years to prosecute her claim (*b*).

Except she be then under disabilities.

So also if it happen that the widow has no right to dower at her husband's decease, or cannot enforce that right when she has it, she will still be protected within another of the savings of the above statute. The following is an instance of this exception :—

Instance of wife's right to dower when no entry was made by her within five years after her husband's death.

A, being seised of lands in fee, married, and levied a fine of them with proclamations. He was afterwards indicted and outlawed for high treason, and died. The attainder was reversed by *A*'s heirs, but not till after *five* years had elapsed from his death. His widow claimed dower after the reversal of the attainder. The question was, whether she was not barred, since more than five years had expired before her claim? But it was resolved that she was intitled to dower, notwithstanding the fine with proclamations, because in respect of the husband's attainder for treason she had no right to dower at the time of the death of her husband, for she could not at or after that period bring or prosecute

Although he had levied a fine with proclamations.

(*a*) 2 Rep. 93. 10 Rep. 99. 13 Rep. 20. Dyer, 224. 2 Roll. Rep. 69, 409; and Plowd. *contra* is not law. (*b*) Vide *supra*, p. 64.

an action to recover her dower according to the direction and saving of the act; but it was further resolved, that she was aided by the saving in the same statute, which preserves to all persons, not parties to the fine, "such actions, right, claim, and interest in or to the lands, &c. as should *first* grow, remain, descend, or come to them *after* the fine was ingrossed and proclamations made, by force of any gift in tail, or by any other cause or matter had and made *before* the fine was levied, so that they take their actions, and *pursue* their right and title according to the law within *five* years *next after* such action, right, claim, title, or interest to them *accrued*, descended, fallen, or come, &c." Now in this case the action and right of dower *accrued* to the wife after the reversal of the attainder, by reason of a title of record before the fine, by reason of the seisin in fee, and the marriage *before* the fine was levied, according to the meaning and intention of the saving in the statute. The widow, therefore, having exerted her claim to dower within five years from the reversal of the attainder, was held not to be barred by the fine and proclamations of her right to endowment (*a*).

The mere suing out a writ of dower will not prevent the bar by the statute.

The above statute of *Henry* the seventh requires the claim to be pursued by *action* or entry within *five* years, &c. If then a writ of dower be brought by the widow within five years from the death of her husband, but she does not pursue it till after the five years have expired, she will be barred, for the mere bringing of the writ is not a pursuing of her claim or title within the intention of the statute (*b*).

[The wife's right to dower may also be barred by nonclaim on a fine levied after her husband's death (*c*).

(*a*) Menvill's case, 13 Rep. 19 *b*. Moore, 639. (*b*) 3 Leon. 50, and Fitzhugh's case, ibid. 221. (*c*) See Preston on Conveyancing, vol. 1, p. 229.

In *Twist*'s case, the husband had aliened to one for life, with remainder to another in fee. After the husband's death, the remainderman levied a fine, and five years elapsed. It is said to have been held that the wife was barred (*a*); but it appears to be doubtful whether the case was in fact decided (*b*). And in *Rowe* v. *Power* (*c*), in the House of Lords, it was held that a fine levied by a remainderman did not operate by nonclaim. It seems, therefore, that the wife's right will not be barred, unless the fine be levied by the tenant of the freehold in possession: though there is some difference of opinion upon this point (*d*).]

Husband's alienation of his copyhold estates defeats free bench.

It has been shown in the consideration of the necessity of the continuance of the husband's seisin to the period of his death, to intitle his widow to dower, that with respect to copyhold or customary estates his power over them, notwithstanding the marriage, is more extensive and complete than over his freehold property; and that in general, when there is no custom to the contrary, seisin of the former at his death is necessary to intitle his widow to freebench (*e*). This being so, if he, as he may, dispose of his copyhold estates during the coverture, the disposition will defeat his widow's right to freebench, unless there be a particular custom that she may avoid the alienation; and she will be equally barred, although her husband died before the admittance of the surrenderee; because he being intitled to be admitted, when that act is completed, the admittance has relation to the time of the surrender, which defeats all the intermediate acts of the surrenderor, and all customary interests derived out of his estate (*f*).

Although he die before the admittance of the surrenderee.

(*a*) Shep. Touch. 28. (*b*) 1 New. Rep. 37. Hob. 265. (*c*) 1 New. Rep. 1. See Carhampton v. Carhampton, Irish T. R. 567. (*d*) See Preston Conv. vol. 1, p. 226. 229. Park on Dower, p. 313. Gilbert's Uses, by Sugden, 122, note. (*e*) *Supra*, p. 374. (*f*) Benson v. Scott, Carth. 275. 3 Lev. 385, S. C.

And his acceptance of a feoffment will have the same consequence.

So also the *acceptance* by the husband of a feoffment in fee of copyhold lands, which he held as tenant from the lord of the manor, will defeat the widow's right to freebench, because by the feoffment the copyhold tenure became extinct.

Thus in *Lashmer* v. *Avery* (*a*) the custom of the manor was found to be that if a copyholder in fee died seised, his widow should hold the estate during her life as freebench. The lord of the manor enfeoffed the husband, a tenant of the manor, in fee, who died seised. Question, whether the feoffee's widow was intitled to freebench? And it was determined in the negative. The reason must have been, that by the feoffment the copyholds were not only severed from the manor but the tenure *extinguished*, for the Court said, "that if the lord had enfeoffed a *stranger* of the land, the custom would have subsisted, and the estate would have remained copyhold," consequently the widow's title to freebench would have continued. That opinion was established by a subsequent decision in *Waldoe* v. *Bertlet* (*b*); there the custom of the manor was found to be, that copyholds were demisable for three lives in succession, and that if any copyholder *died seised* leaving a widow, she should enjoy the lands during her widowhood. The lord of the manor granted a customary tenement by copy to the husband for life, and afterwards conveyed the manor to *B* absolutely, who conveyed the freehold and inheritance of the husband's tenement for a valuable consideration to *C* and others, and their heirs, during the life of the husband, remainder to his, the husband's then wife, for life, with remainder to the husband in fee. After this, the wife

Contra, if the feoffment had been made by the lord to a stranger.

---

see also 1 Term Rep. 600. 2 Term Rep. 580. And the husband's agreement to dispose of his copyhold estates will in equity defeat the wife's right to freebench, *ante*, p. 358. (*a*) Cro. Jac. 126. (*b*) Cro. Jac. 573. Hob. 181, S. C. by the names of Howard v. Partlet.

died, and her husband married again and died seised, and his second wife entered under the title of her widow's estate; and the question was, whether her entry was lawful against the heir of the alienee in fee of her husband? And it was decided in her favour; the Court observing, that the customary estate of the husband continued as it was during his life, and was neither extinguished nor altered by the purchase of the fee simple, which during his life was vested in other persons; whence it was a natural consequence, that all customary incidents to such a customary estate remained, one of which was the widow's title to freebench, that was an excrescence, which by the custom and the law arose of itself out of that estate; that the severance of the freehold from the manor did not destroy the custom as to the widow, and that notwithstanding the remainder in fee was in the husband, which he granted away, still he continued and *died* a copyholder, the lord's act in making the severance not being permitted by the law to prejudice the copyholder's estate.

Husband's leases warranted by the custom will defeat freebench.

Upon the same principle, if the husband under the authority of the custom (*a*) demise his copyhold lands, in which his wife is intitled to freebench, the lease will be good against such her right; for the lessee's title by the custom is at the least equal to that of the widow. *Gilbert*, Ch. B., is of opinion, that if a rent were reserved upon such a lease (the custom intitling the widow to freebench of the *land* only) the widow would

And if a *rent* were reserved the widow would not be intitled to it except by custom.

(*a*) If the lease be not warranted by the custom or by licence, the widow may it seems avoid it and claim her freebench. Gilb. Ten. 303. See Holder v. Farley. Moore, 756. Cro. Jac. 36. In Salisbury v. Hurd, Cowp. 481, it was held that a mortgage by demise made by the husband with the licence of the lord was a bar to the widow. It was contended that there was no custom to make such demises by licence: the case seems to have proceeded on the principle that a custom is not necessary to enable the lord to give a licence to demise.

not be intitled to endowment of the *rent* and reversion, because particular customs are to be strictly pursued (*a*); but that after the expiration of the lease she might claim freebench, for her husband died seised; the possession of the lessee being considered that of the husband (*b*).

Voluntary grants by copy of husband, lord of manor, will bind wife's title to freebench.

And if the husband be lord of a manor, and make voluntary grants of copyhold lands *after* his marriage, they will bind his widow, and deprive her of freebench, because the copyholders claim by the custom, which is antecedent to the widow's title (*c*).

But he cannot defeat his widow's right by his *will* without the authority of the custom.

But it seems that without a special custom the lord cannot by *will* prejudice his widow's right to freebench, so as to enable the grants of other persons to bind her. Thus, in an *anonymous* case in *Dyer* (*d*), the custom appeared to be that the lands were usually demised by the lord of the manor, or his *overseer* or *deputy*. An owner in fee of the manor married, and by his *will* authorised certain persons to grant leases according to the custom, to raise fines to pay his debts, and died; these persons held a court in their own names, and granted a reversion belonging to two copyholders to three others. The widow recovered her dower, and it was adjudged, that she was not bound by the grant. The principle must have been this, that the custom did not enable the lord by his will to appoint persons to make customary grants of copyholds, to bind his widow's title to freebench, and which seems to be necessary, since the widow's legal right became consummate by her husband's death, and took precedence of his testamentary disposition. Upon which principle it is, that copies granted by the heir

---

(*a*) But by special custom the widow may have her freebench, subject to the lease, and receive the rent. Watk. Cop. vol. 2, p. 76. (*b*) See Perk. sect. 435, 436. Gilb. Ten. 320, 321; and Salisbury v. Hurd, Cowp. 481. (*c*) Gilb. Ten. 203. 4 Rep. 24. 1 Leon. 16. 8 Rep. 63 *b*. (*d*) 250 *b*, pl. 89.

before endowment will not bind the widow (*a*). Yet as against other persons the lord may, if the custom do not forbid it, appoint by his will, that his executors shall make grants by copy, which if done in conformity with the custom will be valid (*b*).

The subject next proposed to be considered was,

3. What acts of the wife singly during the marriage will defeat her title to dower at her husband's death.

Bar of dower by wife's sole acts during marriage.

The wife's attainder of treason, murder, or felony will exclude her from dower (*c*); but if she obtain a charter of pardon before her husband's death, her right of dower will be revived, and for this reason: by marriage and the seisin of her husband she was intitled to dower before her attainder, which alone interposed between her and such right; but when that obstacle is removed by a pardon there remains no impediment to endowment, her title being consummate at her husband's death (*d*).

By attainder. *Contra*, if pardoned before husband's death.

So also if she elope from her husband with another man, with whom the law presumes that she lives in adultery, and will not admit of an averment to the contrary (*e*), and there is no subsequent reconciliation (*f*), she forfeits her dower by the statute of *Westminster* the second (*g*). And if during the elopement her husband purchase lands and alien them, or sell those of which he was seised at the time of his wife's leaving him, and he afterwards become reconciled to her, she will be intitled to dower of all such lands (*h*).

By elopement. *Contra*, if they be reconciled.

[A sentence of divorce *propter adulterium* is not

(*a*) Co. Litt. 58 *b*, note 6. (*b*) Co. Litt. 58 *b*. Gilb. Ten. 204. (*c*) Perk. sect. 349. (*d*) Co. Litt. 33. 13 Rep. 23, *ante*, p. 46. (*e*) Paynell's case, 2 Inst. 435. Harg. Co. Litt. 32 *a*, *n*. 10. (*f*) A reconciliation will not restore the wife's right to dower, unless it be voluntary, and without the coercion of the Ecclesiastical Courts. Co. Litt. 32 *b*. 2 Inst. 436. Perk. 354. (*g*) 13 Edw. I. c. 34. (*h*) Co. Litt. 33, note 8. 13 Rep. 23.

alone a bar of dower (*a*). And the wife does not forfeit her dower by adultery, unless she leaves her husband: hence it has been said, that if she lives in adultery upon an estate belonging to her husband, this is not an elopement, and therefore no forfeiture of dower (*b*): but according to the opinion of *Lord Coke*, leaving her husband's house of habitation is an elopement within the statute (*c*).]

Wife's leaving husband with his consent, and living in adultery, a bar to dower.

Whether the wife leave her husband *with* or without his consent, and live in adultery, she will nevertheless forfeit her dower if there be no subsequent reconciliation between them (*d*).

Thus, in *Coot* v. *Berty* (*e*), the defendant in dower pleaded elopement of the wife, who replied that her husband bargained and sold her to the adulterer. The replication was held to be bad, for the *licence* of the husband to his wife's adultery could not be pleaded in bar to an action of trespass brought by him, although it might be insisted upon in mitigation of damages.

No elopement but that put in issue can be proved.

If elopement be pleaded in bar of dower, and issue be joined upon a reconciliation, the defendant will not be permitted to prove any other elopement besides that mentioned in his plea; because there might have been many elopements of the wife and subsequent reconciliations, and the demandant can only be prepared to support her replication of a reconciliation after the particular elopement specified in the defendant's plea (*f*).

The wife's elopement must be *sponte sua* or subsequently approved by her.

In order to create a forfeiture of dower under the statute of Westminster the second, the wife's leaving her husband must have been her own voluntary act (*g*),

---

(*a*) Co. Litt. 32 *a*. note 9. Ibid. 33 *b*. Noy, 108. Godb. 145. See Park on Dower, p. 20. (*b*) Fitz. N. B. 150, H. Perk. 355. 9 Vin. Ab. 242, pl. 11—12. (*c*) 2 Inst. 436. (*d*) 2 Inst. 436. Harg. Co. Litt. 32, *a*. *n*. 10. (*e*) 12 Mod. 232. (*f*) Haworth v. Herbert, Dyer, 106 *b*, pl. 22. (*g*) See the statute.

or her approval of it afterwards by continuing with the adulterer. As instances of the first proposition :—

Instances to prove these propositions. Of the first.

If the relations of the husband detain him from his wife, so that she is ignorant of what is become of him, and they pretend that he is dead, and procure her to release all marriages and interest that she may have in him as her husband, and moreover persuade and induce her to marry again, she having no notice of her husband being alive: although the man with whom she cohabits have notice of her husband being living, and although she in truth lives in adultery with such man, she will not forfeit her dower; because *non reliquit virum sponte*, as mentioned in the statute. Hence it seems that elopement was no bar to dower at the common law (*a*).

So also if the wife be forcibly taken away from her husband, and continue with the man against her will, her right to dower will not be forfeited (*b*).

Of the second.

As instances of the second proposition :—If the wife be taken away against her will, but voluntarily remains with the adulterer, she will be barred of her dower (*c*); or if after such voluntary residence, she leave him, or he turn her away, and her husband is not voluntarily reconciled to her, she will in all these cases be excluded from dower (*d*).

Cohabitation evidence of a reconciliation.

As to what will amount to sufficient evidence of a subsequent reconciliation, it would seem that the cohabitation of husband and wife, without compulsion, would be that kind of evidence (*e*).

Husband not obliged to take his wife back again.

But the husband will not be obliged to take his wife back again, after she has eloped from him and committed adultery (*f*).

(*a*) Green v. Harvey, 9 Vin. Abr. 241, pl. 9. 1 Roll. Abr. 680, pl. 9, S. C. (*b*) Perk. sect. 354. (*c*) Co. Litt. 32 *b*. (*d*) Perk. sect. 354. Co. Litt. 32 *b*. (*e*) 1 Roll. Abr. 680, pl. 10. Dyer, 106 *b*. See Bateman v. Ross, 1 Dow. 245. (*f*) Govier v. Hancock, 6 Term. Rep. 603.

Sole fine of wife a bar to dower.

If the wife *alone* be permitted to levy a fine it will bar her right to dower, unless the husband enter and avoid it (*a*). But the Court will not admit of such a fine, if they be apprised, that the conusor is a married woman (*b*).

4. What acts of the widow after her husband's death will be a bar or satisfaction of her dower.

This subject has been partially considered under assignment of dower against common right (*c*). The principle is, that when the widow consents to an act inconsistent with her right to actual endowment, she shall be bound by her consent, and barred of her legal title. Attention to this principle will explain what further remains to be treated of under this head.

Dower barred by widow's acceptance of

If, then, the widow agree to accept an interest in the dowable estate, which is inconsistent with her title to dower in that estate, this acceptance will bar her of her legal right.

a lease for life,

Suppose that she accept from the heir a lease for *life* of the whole of her husband's freehold estates; since she cannot claim dower out of them without partially defeating such lease, she will be barred of her dower (*d*). But it would seem, from the principle before stated, that if her husband had died seised of 100 acres, and the lease included 50 acres only, she might claim dower out of the remaining 50, provided she did not accept the demise in lieu of dower in the whole.

or for years.

So also if the lease accepted were not for life, but for a term of *years* only, still it will exclude her from dower during the term, if it include the whole of the dowable estate (*e*).

Except she was then under a second coverture,

But if the widow married again before her dower was assigned, and then a lease for life or years was

---

(*a*) 10 Rep. 43. (*b*) Moreau's case, 2 Blackst. 1205. Ex parte Abney, 1 Taunt. 37. Vid. *ante*, p. 142. (*c*) *Supra*, chap. 9, p. 400, *et seq.* (*d*) Perk. sect. 350. (*e*) Gilb. Dower, 391. Fitz. Nat. Brev. 149, E.

made to her of the dowable lands by her first husband's heir, she would have a right to waive the demise at her second husband's death; and if she did so, she would be intitled to dower, because at the time when the lease was made she was under the disability of coverture (*a*).

or the lease for years was made to her by her husband before marriage.

Suppose further that a lease for a term of years had been granted by the husband to his wife *before* marriage, and that he died during the term seised of the reversion in fee; it is presumed that in such case also his widow would be *immediately* intitled to dower, because at the time she accepted the lease she had no title to dower, that right having afterwards accrued by the marriage; and had the term been granted to a stranger, she would, as we have seen (*b*), be intitled to dower of the reversion with a *cessat executio* during the term; the term, then, happening to be vested in herself, cannot alter that right; consequently, when the dower is assigned, and she becomes seised of an estate for life in a third part of the premises, the term for years in that part meeting with the estate for life merges in it. It is, therefore, presumed that the widow will hold that share in dower for her life, and the remaining two-thirds under the lease during the continuance of the term (*c*).

Dower prevented by widow's release.

Another mode by which the widow may deprive herself of endowment may be by a release (*d*). But there is a distinction to be attended to in regard to the form of such release, viz. between a release by the widow of her *right*, and the release of all *actions*, &c.; for if she release her *right* to dower, it will be a bar to her whether it be made to the tenant of the freehold, or to the person in reversion. But if the release be of all

Distinction as to this between a release of the *right*, and of the *action*.

(*a*) See Jenk. 73. (*b*) *Supra*, p. 371. (*c*) Perk. sect. 351. Owen, 154. (*d*) See the form of such a release contained in the conveyance in Append. No. 10, Vol. ii.

actions, suits, quarrels, and demands, dower and actions for dower, which arose or came to the widow on account of her husband's death, and such release, instead of being made to the tenant of the freehold, is granted to the person in reversion, it will not bar her *right* to endowment. The reasons upon which this distinction is founded will appear in a supposed case, stated by way of example on each form of release.

1. Of the right.

If a widow, intitled to dower out of lands limited to *B* for life, with remainder to *C* in fee, release all her right to *C*, and afterwards implead *B* for dower, he may take advantage of the release granted by the widow to *C*; and so would *C* after *B*'s death be allowed the benefit of a similar release made by the widow to *B*; because the right to dower arises out of both the estate for life and that in reversion, and when the *jus habendi*, which is the *principal*, is released, it follows that the *action*, which is but the mean to recover it, is also gone (*a*). It is observable that the person in reversion had an estate upon which the release of a right in it might enure; this right the widow had in the present instance, and unless she were barred of it by her release against *B*, the ter-tenant, her recovery of dower against him would be a charge upon the estate of *C*.

2. Of the action.

Suppose the release to *C* was not of the *right*, but of all *actions*, &c. as above; such a release would not extinguish the right to dower; first, because the widow had no right of action against *C*, but against *B* only; and secondly, for that the widow's action for dower being a *real* one, a release of such actions can alone be made to the person who is tenant of the freehold, against whom only a *præcipe* lies (*b*). To apply these principles to the present case: since the widow could not sue *C*, the releasee, for her dower, because he was

---

(*a*) Co. Litt. 265. 1 Rep. 112 *b*. 8 Rep. 151 *b*. Co. Litt. 267 *b*.
(*b*) Litt. sect. 495.

not tenant to the *præcipe*, if *B*, who was such tenant, were to plead to the writ of dower the widow's release of all actions to *C*, her replication that *C* had nothing in the *freehold* at the time of the release would be sufficient to avoid the plea; the rule of law being general, that in order to give validity to a release of actions real, the releasee must be tenant of the freehold either in deed or in law (*a*). Hence it is necessary in a plea of such a release to aver, that the person to whom it was made was *tenens liberi tenementi* (*b*).

It has been observed that, in general, a widow's right to dower cannot be barred at law by a collateral satisfaction, as by assignment of lands in which she is not dowable, or of a rent issuing out of them, except it were so provided as to be a legal jointure before marriage, and, therefore, a bar by the statute of jointures; or unless it were by *devise* expressing in direct terms that it should be in satisfaction of dower, and, therefore, one of the jointures mentioned in the act, and voidable at her election after her husband's death (*c*). But in cases of this nature, Courts of Equity have extended the legal rule; for in instances of testamentary provisions by the husband for his widow, it is the constant habit of those Courts to consider them in the nature of equitable jointures, although not so expressed in words, when the intention appeared that they were made with that view.

These provisions, however, being made *after* marriage, and for that reason *voidable* by the widow, Courts of Equity have obliged her to *elect* between such provisions and her dower. This being a subject of frequent occurrence, it will be useful to consider it with particularity.

(*a*) Altham's case, 8 Rep. 150, 151 *b*. (*b*) Anon. Cro. Jac. 151. (*c*) Vide *supra*, p. 399, 466. Moor, 31. Co. Litt. 36 *b*. Cro. Eliz. 128, 274. 4 Rep. 4. Dyer, 220.

Election: its principle.

The doctrine of election is founded upon this principle, that a person shall not be permitted to claim under any instrument, whether it be a will or deed, without giving full effect to it in every respect, so far as such person is concerned (*a*); the equity of the Court of Chancery operating upon the devised interest

---

Whether election against an instrument requires forfeiture of all interest under it, or compensation only.

(*a*) It has recently become a question in what manner the principle of election is to be enforced, in cases where a party being called upon to elect under an instrument purporting to dispose of his property, and at the same time conferring other benefits upon him, elects to rètain his own property in opposition to the instrument. According to some opinions his election is followed by a forfeiture of the whole of that which the instrument gives him, the property thus forfeited passing to the parties disappointed by the election which he has made. See Sugden on Powers, p. 380. According to others, the party thus electing is bound to relinquish only so much of the property given to him, as will be sufficient to compensate the disappointed parties. The question has been elaborately considered by Mr. Swanston, in a note, in which the authorities are collected and compared with great learning and research: he arrives at the following conclusion:—" This deduction of authorities appears (in the instance at least of election under wills and deeds of donation) to establish two propositions; 1. That in the event of election to take against the instrument, Courts of Equity assume jurisdiction to sequester the benefit intended for the refractory donee in order to secure compensation to those whom his election disappoints; 2. That the surplus after compensation does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the Court controlled his legal right." 1 Swan. 441.

383

In two late cases, this point became the subject of direct discussion. In Green v. Green, 19 Ves. 665. 2 Mer. 86, the question arose under a marriage settlement, by which an estate belonging to the wife's family, and an estate supposed to belong absolutely to the husband's father, but which was in fact subject to a prior entail, were settled to the same uses. The Lord Chancellor intimated an opinion, that if the son of the marriage claimed the entailed estate against the settlement, he must give up the whole of the interest which under the settlement he took in the other estate. The observations in his Lordship's judgment seem to favour the opinion, that election under a will requires compensation only, but he thought that rule could not be applied to a deed founded on contract.

This case may be considered as deciding, that in the instance of a

quousque **satisfaction be made to the disappointed devisee (*a*). With respect to the cases which relate to**

Rules, as to satisfaction of dower by implication.

---

deed founded on contract, a party electing to dispute it forfeits the whole of the benefits which he might have taken under it. It was not necessary to decide in what manner the property thus forfeited was to be applied.

The question was again discussed in Tibbits v. Tibbits, a case arising upon a will. The circumstances are stated in 2 Mer. 96, note, and 19 Ves. 656. The Lord Chancellor gave judgment on the 28th of June, 1821. The question, he said, was whether the defendant in the event of his electing to take against the will, was bound to forfeit all the benefits he took under it, or whether he was only to make a compensation to the plaintiffs for what the testator intended them. On this point he had looked through all the cases with great attention, and they contained many *dicta*, not easily reconciled. Though it would perhaps be too much to say that that should be the rule universally, he thought this was a case for compensation only. At the same time he was of opinion, that there might be cases where not only compensation was to be made, but the whole was to be given up. He thought the old principle of the Court, till shaken by some later determinations, was compensation; but it had since been shaken.

This decision appears to point at a distinction between some cases of election under wills where compensation only is to be required, and others where it may be necessary to relinquish the whole property, and leaves it open to inquire what may be the circumstances distinguishing the cases, and the principle of the distinction between them.

The Lord Chancellor has observed that there is no point upon which a greater variety of decision appears, and that it is impossible to reconcile the doctrine to be collected from the cases. 19 Ves. 666, 667. No expectation can therefore be entertained of any solution entirely disembarrassing the subject from the difficulties in which it is involved: but a consideration of the principle of the doctrine will suggest an hypothesis, by which some of the apparent contradictions would be removed.

The principle on which the docrine of election is commonly said to be founded is, that an implied condition is supposed in equity to be annexed to the devise. A consistent adherence to this principle would require that Courts of Equity, having once assumed the

(*a*) See many of the cases collected in vol. ii. "Law of Legacies," chap. "Election."

the election of widows between dower and provisions under the wills of their husbands, they have pecu-

---

existence of this condition, should follow it up by consequences analogous to those which would ensue from a similar condition actually expressed; and therefore, that a refusal to perform the condition should be treated as a forfeiture or relinquishment of the estate devised.

The consequence would be, that the estate would devolve as undisposed of on the heir at law, had not the Courts held that an equity arises in favour of the parties disappointed by the election, intitling them to have the property which is thus rejected applied to compensate their loss. It has been doubted whether this doctrine be well founded, see 1 Swan. 424, *et seq.* It is, however, supported by analogy to some cases in which Courts of Equity have assumed jurisdiction to apply property forfeited by the breach of an express condition, in compensation of a loss occasioned by that breach of condition. See Webster v. Mitford, 2 Eq. Ca. Ab. 363. 1 Swan. 435, 449. If an estate be devised to *A*, on condition of his paying a legacy to *B*, a breach of the condition intitles the heir to enter, but in equity he will be deemed a trustee of the estate for *B*, to the extent necessary for raising the legacy. See Wigg v. Wigg, 1 Atk. 383, and 2 Freem. 278. If this equity of compensation be rightly administered against the heir, when a forfeiture is incurred by breach of a condition to pay a sum of money to another, it ought by analogy also to prevail in the case of a forfeiture incurred by breach of a condition to give up any other species of property. But this equity between the disappointed devisee and the heir, cannot reasonably be extended beyond the object of making compensation to the former, and therefore it would seem that if the property relinquished should happen to be more than sufficient to afford that compensation (an event of course improbable) the surplus would be left to the heir at law. Thus the rule of election may perhaps be, that the property rejected by the electing party descends as undisposed of, subject to the charge of compensating the disappointed devisee. If this be the rule, the authorities in favour of forfeiture become reconcileable with many of those which speak of compensation: the former referring to what one party is to lose, the latter to what the other party is to receive.

In Rich v. Cockell, 9 Ves. 379, the Lord Chancellor is reported to have said "All election goes upon compensation. If by a will, which gives *A*'s estate to *B*, an estate is given to *A*, he may say he will keep his own estate: the compensation upon which the Court goes, is the implied condition of which the other is to have the

liarities belonging to them; for the title to dower being a clear *legal* right, the result of all the cases ap-

---

benefit; that whoever takes in consequence of the election, shall take it *cum onere.*" The former part of this passage may admit of different interpretations, but the conclusion can scarcely be understood, except as implying, that an election against the will, casts the devised property on some one else, who takes it subject to the burthen of making compensation.

In Ker v. Wauchope, 1 Bligh. 21, the Lord Chancellor says: "It is equally settled in the law of Scotland, as of England, that no person can accept and reject the same instrument. If a testator gives his estate to *A*, and gives *A*'s estate to *B*; Courts of Equity hold it to be against conscience, that *A* should take the estate bequeathed to him, and at the same time refuse to effectuate the implied condition contained in the will of the testator. The Court will not permit him to take that which cannot be his, but by virtue of the disposition of the will; and at the same time to keep what by the same will is given or intended to be given to another person. It is contrary to the established principles of equity that he should enjoy the benefit while he rejects the condition of the gift." After adverting to some other points, his Lordship proceeds to consider in what manner the property relinquished is to be disposed of. "But as the appellants have in fact to a certain extent annulled the deed by judicial process, their election is thereby made to take nothing under the repudiated instrument. A question then arises, what is to become of the life-interest, which the appellants cannot take either as legatees, or as next of kin? In our courts we have engrafted upon this primary doctrine of election, the equity as it may be termed of compensation. Suppose a testator gives his estate to *A*, and directs that the estate of *A*, or any part of it should be given to *B*. If the devisee will not comply with the provision of the will, the Courts of Equity hold that another condition is to be implied as arising out of the will and the conduct of the devisee; that inasmuch as the testator meant that his heir at law should not take his estate which he gives *A*, in consideration of his giving his estate to *B*; if *A* refuses to comply with the will, *B* shall be compensated by taking the property, or the value of the property which the testator meant for him out of the estate devised, though he cannot have it out of the estate intended for him." Ibid. p. 25.

The first of these passages plainly implies that *A*, on refusing to give up his own estate, forfeits all the benefits intended for him by the will. If he might elect to make compensation only, retaining the surplus, it would be permitting him to take that which could

pears to be that an intention to exclude that right by voluntary gift must be demonstrated either by express

---

not be his except by virtue of the will. The equity of compensation is then spoken of as a secondary doctrine, distinct from that of election, and is treated as a question arising between the disappointed devisee and the heir at law, after the claim of *A* has been displaced by his election. Thus the process is twofold: the doctrine of election takes the estate from the party electing, and the disappointed devisee is then by a distinct doctrine held to have an equity as against the heir to claim a compensation. That equity of course can attach only to the extent required for the purpose of compensation, and if a surplus remain, *A* being excluded from taking any thing under the repudiated instrument, it must result to the heir.

In Vane v. Dungannon, 2 Sch. and Lef. 130, Lord Redesdale, in decreeing that a party must elect, observed that if she elected against the will she must give up *all* that she took under it: he added that she was to give it up in order to compensate the loss sustained by the other parties. Entire forfeiture on her part was, therefore, to be the consequence; but the use of the word compensate implies that the others were not to receive more than an equivalent. It follows that the surplus, if any, would be undisposed of.

The decree in this case, indeed, directs that in case of an election against the will, the benefits given by the will to the party so electing should be divided between the others, in proportion to the shares of which they would be disappointed, without providing for the event of a surplus remaining: and in Ker v. Wauchope, and some other cases, expressions are to be found, intimating that all the property forfeited would be applied to the purpose of compensation. This may be thought to sanction the opinion, that in all cases the disappointed devisee takes the benefit of the forfeiture, whatever may be the value. But the authorities, in speaking continually of compensation for a loss, as that to which the party is intitled, are inconsistent with the idea that he can take the whole, if more than equivalent to the amount of his loss; and it is, therefore, more probable, that the expressions alluded to above have proceeded on an assumption, (which would naturally be made) that the property given by the will, if relinquished, would not be more than sufficient to yield a compensation. If election against the will be attended with forfeiture of the property devised, it is of course not likely that the party electing should make so capricious a choice, as to give it up, unless inferior in value to the property intended to be given away from him. The event of a surplus remaining is, therefore, in general, so highly improbable, that it is not surprising that

words, or by clear and manifest implication; so that if there be any thing ambiguous or doubtful, then the

---

it should not be contemplated, and should not be specifically provided for in the decree made in the first instance.

For this reason, if the property be forfeited by the party electing, the question whether the other is to take the whole, or whether he is to take a compensation out of it, leaving the surplus to descend as undisposed of, is of no practical importance, in cases where the surplus would descend to a third person, for in such cases no surplus would remain. But it becomes material, with reference to that class of cases where the person who is to elect, is also the person upon whom the surplus (if considered as property undisposed of) would devolve: as in cases where the heir at law is put to elect by a devise from his ancestor.

If the doctrine of election be founded on analogy to the rules relating to conditions, it must necessarily admit of some modification in its application to the case of an heir at law. A devise to the heir being inoperative, and he being himself the person to take advantage of any forfeiture, a mere condition annexed to a devise to him cannot be enforced in the same way as against a stranger: it has no effect, except where the doctrines of Courts of Equity consider it as a trust attaching on the estate, as in the case of a devise to the heir, on condition of paying a sum of money to a third person. See Anon. 2 Freem. 278. So where a case of election is raised against the heir by a devise to him, he is treated as a trustee for the other objects of the testator's bounty, to the extent of the bounty intended for them. "The devise is read," says Sir William Grant, "as if it were to the heir absolutely, if he confirm the will; if not, then in trust for the disappointed devisees, as to so much of the estate given to him, as will be equal in value to the estates intended for them." 2 Ves. and B. 191. Thus in such cases the compensation is deducted from that which is devised to the heir. The surplus, if any, belongs to him in his character of heir.

Similar observations apply to cases where the party electing fills any other character, by which the property would be his independently of the will. If the disappointed devisee be intitled to compensation only, the surplus being undisposed of would result to the party who has made the election.

This distinction may possibly reconcile the authorities in favour of the doctrine of forfeiture, with most of those in which the judgments or decrees admit a right of electing against the will on the terms of making compensation only, and retaining the surplus. The latter have chiefly been cases in which the defendant was the heir

averment that the provision was made in lieu of dower cannot be supported. The only question in the cases

---

at law of the testator, put to elect between estates devised to him by the will and estates claimed against the will under a previous entail. Anon. Gilb. Eq. Rep. 15. Streatfield v. Streatfield, Cas. Temp. Talb. 176. 1 Swan. 447. Welby v. Welby, 2 Ves. and B. 187. Tibbits v. Tibbits, *ub. sup.* In Noyes v. Mordaunt, 2 Vern. 581. Gilb. Eq. Rep. 2, the defendant was one of the testator's co-heiresses.

The case of Bor v. Bor, 7 Bro. P. C. 167, ed. Toml. is conformable to this distinction. The judgment of Lord Hardwicke lays down the general rule of forfeiture: "That when a father disposing of his estate, happens to give a younger son what was settled upon the elder, and at the same time gives the elder son some other provision; if the elder will defeat the will in any part, he shall not at the same time take any benefit under it." P. 178. The language of the decree which followed this judgment, intimates that, if the circumstances had raised a case of election against the appellant, he would have been called upon to elect whether he would abide by the devise, or convey to the respondent so much of the lands taken under the will as should be equal in value to the entailed estates retained in opposition to it. In this case the appellant was the heir of the testator's second son: the eldest having died without issue, he had become the testator's heir.

In the case of Rich v. Cockell, 9 Ves. 369, it was admitted in the argument, and the Lord Chancellor seems to have agreed, that the defendant, if bound to elect, might elect to make compensation only: the defendant's wife had bequeathed to him part of her separate property, and had by the same will given away other property which he claimed as his own. The separate property given him by the will, would independently of the will, have devolved upon him *jure mariti*; and the opinion intimated in this case, therefore, falls within the distinction mentioned above.

On the other hand, in Green v. Green, the estate which the defendant took under the instrument, could not have been his except by virtue of that instrument, and it was considered that he was bound to relinquish it *in toto* if he insisted on his other claims.

But whether this suggestion be or be not well founded, the weight of the authorities, as well as the principle on which the doctrine of election is considered to be founded, appear strongly to support the conclusion, that the cases alluded to above have proceeded upon some distinct grounds; and that they do not establish as an universal rule, that the party who refuses to comply with the implied condition of the devise can retain any part of the benefits conferred on him by the will.

has been, whether an intention, not expressed by apt words, could be collected from the terms of the in-

---

The language usually employed by the Courts on the subject of election, is decidedly inconsistent with the existence of such a rule. The familiar expression that a party cannot take under and against the same instrument, cannot mean that he may take partly under it, and partly against it. When it is said, that he is to choose which of two estates he will take, does it imply that he may choose the whole of one, and part of the other? The expressions that no man shall take any thing under an instrument without conforming to it, as far as he is able, and giving effect to every thing contained in it, (2 Ves. jun. 370,) that he must abide by the will *in toto*, or by his paramount claims *in toto*, (3 P. W. 124. 2 Atk. 43,) that no person puts himself in a capacity to take under an instrument without performing the conditions of it, express or implied, (2 Sch. and Lef. 267,) and that he can take nothing under an instrument which he repudiates, (1 Bligh, 25,) are all repugnant to the notion that one who elects to take in opposition to a will, can avail himself of that will, to claim the surplus of the property devised; while they leave it open to him to make that claim, by any other title independent of the will.

In some cases, the decrees (as far as they are stated in the Reports) do not appear to have gone further than to declare that the defendant must elect to take under or against the will, or that he must elect between the two estates. (1 Swan. 413. 1 Dow. 252. 2 Sch. and Lef. 455. Belt's Supplement, 155.) This declaration alone would not imply that there was any middle course between an entire adoption, and an entire rejection of the will. In other instances, the decrees, after directing the election to be made, have proceeded to specify the consequences of each alternative, in terms plainly indicating, that an election against the will is to be followed by an extinguishment of all title under it; in some cases declaring that the defendant will not be entitled to any benefit under the will, (Morris v. Burroughs, 1 Atk. 404. Pulteney v. Darlington, 7 Bro. P. C. 546, ed. Toml. Blount v. Bestland, 5 Ves. 517;) in others directing that all that has been, or may be received under the will, shall be accounted for. (Macnamara v. Jones, 1 Bro. C. C. 482, note, ed. Belt. Vane v. Dungannon, *ub. supra.*)

The observations made by Lord Chief Justice De Grey, in one of these cases, Pulteney v. Darlington, have generally been considered adverse to the opinion, that all the benefits conferred by a will must be relinquished by one who elects against it. Only a few passages of his judgment have been reported, (2 Ves. jun. 560. 3 Ves.

strument. The decisions which have been made can be of no other use than to assist the judgment of the

---

530;) it is not easy to interpret them with certainty, but it may be doubted whether they necessarily bear the meaning imputed to them.

The decree directed that Mrs. Pulteney, a married woman, should make her election. On a rehearing, the Lord Chancellor Bathurst was assisted by Lord Chief Justice De Grey and Baron Eyre. It appears (from the statement of Lord Rosslyn) that one of the objections urged against the decree was, that Mrs. Pulteney, being a married woman, could not defeat her husband's interest, and therefore was unable to elect: she had, it was said, no alternative. The argument therefore raised this difficulty, that in a case of election, a married woman, not being able to perform the condition of giving up her own estate, would (unless her husband was willing to convey) necessarily forfeit what was devised to her. The observations in question seem to have been designed to meet this objection. "In answer to that, the Chief Justice distinguishes the equity of this Court from an express condition:" which, he says, "must be performed as framed; and if not it would induce a forfeiture; but the equity of the Court" (as he very well expresses it,) "is to sequester the devised interest *qvousque*, till satisfaction be made to the disappointed devisee." The first part of this passage implies, that the difficulty raised by the argument would exist in the case of an express condition that a married woman should give up an estate: if unable to perform it, *modo et formâ*, she would incur a forfeiture. The second part shows that this difficulty would not exist in the case of election: treating of the case of a party under disability, it distinguishes between the strict rule of forfeiture for breach of a legal condition, and the mode in which election would be enforced in equity. It seems intended to imply that the married woman, if unable to make and perfect her election, would not incur an immediate forfeiture; but that the enjoyment of the devised estate would, in the mean time, be withheld. The natural meaning of sequestering the estate *quousque* is, not that a part is to be taken away for ever, but that the whole is to be detained for a time. Lord Rosslyn, who quotes the passage, adopted a similar idea in a case occurring a short time afterwards, in which he again referred to this judgment; "Therefore the Court says, there shall be an election, and gives an opportunity of electing, and will not easily hold the election concluded. But if the party is under restraint, and cannot accomplish that, it is the misfortune of the party: but the consequence is, that

Court in determining what may be considered a sufficient manifestation of the intention; and the result

---

while he continues in that situation his claim must be barred." 2 Ves. jun. 697.

A presumption in favour of this view of the Chief Justice's judgment arises also from the fact, that the declaration of the decree was not varied on the rehearing. Mrs. Pulteney was to make her election, whether she would take under the will of Sir William Pulteney, or under that of General Pulteney: and in case she should elect to take an estate tail under the will of Sir William Pulteney, it was declared that she would not be entitled to any estate under the will of General Pulteney. It was subsequently referred to the Master, to inquire which election would be most for her benefit: and he reported that it would be for her benefit to take under the will of Sir William Pulteney; and an arrangement was then agreed on, by which the benefits given to her by General Pulteney's will were valued, and she secured the amount for the benefit of the disappointed devisees. 2 Ves. jun. 553. 3 Ves. 385. This arrangement followed the principle of the decree: by the election against the will of General Pulteney, she forfeited the right which the will gave her to his property; but instead of relinquishing the property in specie, it was agreed that she should give the value of it in money.

The remarks of Lord Rosslyn on the first hearing of Cavan v. Pulteney, 2 Ves. jun. 560, appear contrary to the view here taken; but when the case was a second time before him, his expression was, that the will must be understood to impose upon Mrs. Pulteney, "in nature of a condition, an obligation to conform to the will, or if she did not, to forfeit all the interest she took under it." 3 Ves. 385. In another case he says, "that the Court cannot execute a will by parcels; it must be totally; or with regard to the party, by whose means it fails, the Court can do nothing for that party." 2 Ves. jun. 697.

It may be remarked, that in Pulteney v. Darlington, Mrs. Pulteney was the cousin and heir at law of General Pulteney, against whose will she elected to take; and if, therefore, an opinion was entertained that she might take the property devised, subject to the obligation of making compensation, it may perhaps be referred to the distinction alluded to above. The declaration of the decree confined the forfeiture to the rights which she had by virtue of the will.

It is apparent, that if the rule of election permitted the party contravening the will to retain the property given by it, subject to a deduction for compensation, there would be little security in any

of all the cases upon implied intention is, that the instrument must contain some *provision inconsistent* with the assertion of a right to demand a third of the lands to be set out by metes and bounds, &c. Such are the principles which have been established upon the present subject, and the difference of opinions which may be found in the cases is not to be ascribed to any doubt of those principles, but merely to the difficulty in applying them to the facts of each particular case. It cannot be expected that all the determinations necessarily founded upon such a variety of circumstances should be uniform, or to the satisfaction of every judge; it will, therefore, be my endeavour, in considering the cases, to point out

---

case for the performance of the testator's intention. According to either rule, the election is of course against the will, where the property given by it is less valuable than that which the testator attempts to give away from the defendant. If it be more valuable, it would, according to the rule of forfeiture, be equally of course, that the defendant would elect to confirm the will. But upon the contrary supposition, the choice would be indifferent to the defendant, in point of pecuniary benefit. If he took under the will, he would be entitled to the larger property. If he took against it, he would retain the smaller property, and the difference would be made up to him, by his receiving the surplus value of the other. No benefit could be gained by effectuating the intention, and nothing could be lost by defeating it.

Hence, upon this principle, a knowledge of the value of the two funds would not be essential, to enable the defendant to make his election with safety. By electing against the will, he would in every case secure himself from loss; and there would be no necessity for postponing his determination till after the accounts were taken, and the value ascertained, or for references to a Master, in the cases of infants and married women.

In Pulteney v. Darlington, Lord Chief Justice De Grey, adverting to the situation of the husband of a married woman who is decreed to elect, observes that the most favourable supposition for him is, to consider him as having an estate that rises and falls with hers, "because otherwise he takes against the will." 2 Ves. jun. 560. This observation could scarcely have been made, if a party taking against the will were put in possession of the whole amount, which he could obtain by taking under it.

their differences, and which of them it is probable would be at present approved of under the same circumstances.

When a pecuniary legacy, personal annuity, or other interest merely affecting the personal assets, is bequeathed by the husband to his widow, without a declaration that it is intended in satisfaction of dower, no implication whatever arises that the disposition was made with that view or intent, so that she will be intitled to both (*a*). But when lands or rents out of lands in which the widow is dowable are bequeathed to her by her husband, a presumption arises from that circumstance (though not of itself sufficiently clear and certain to put her to an election, as after appears), that such devises were meant in lieu and bar of dower.

Difference as to implication, when the bequest is of money or lands.

1. The first consideration, therefore, will be when the testamentary disposition to the widow is of *lands* of which she is dowable, and secondly, of *rents* out of them.

First. When the testamentary disposition to the widow is of lands in which she is intitled to dower.

Instances where she was not put to election.

The great and leading case upon this subject is *Lawrence* v. *Lawrence* (*b*). There the husband devised his manor of *Little Sherrington*, mansion-house, and lands of the annual value of 130*l.*, to his wife, *durante viduitate*, with remainder, together with all his other lands, to trustees for twenty-four years from his death, with remainders over. The trusts of the term were for payment of debts and legacies; and as a further provision for his wife, the testator directed that, *after two years* of the term were expired, his trustees should permit her to receive the rents of one of the farms of 60*l.* a year, and *after five* years of the term were elapsed, to permit her to receive the rents of an-

---

(*a*) Strahan v. Sutton, 3 Ves. 249. Ayres v. Willis, 1 Ves, sen. 230. (*b*) 2 Vern. 365. 3 Bro. Parl. Ca. 8vo. ed. 483.

other of the farms of 90*l.* a year, for the *remainder of the term*, so long as she continued a widow. He then gave her several pecuniary and specific legacies, and appointed her sole executrix. No mention was made in the will, that any of the above provisions were to be in satisfaction of dower. The widow proved the will, possessed the personal estate, and entered upon the lands devised to her. She afterwards recovered her dower at law, of the yearly value of 16*l.*, and the lands were duly assigned. Upon a bill by the remainderman to be relieved against the judgment, *Lord Somers* was of opinion, that the testamentary dispositions to the widow were intended in satisfaction of her dower, which intention appeared from the manner in which he had disposed of his lands not limited to his wife for her life. This decree was reversed by *Lord Keeper Wright*, because, in his opinion, there was nothing in the will which showed a sufficiently clear intention that the widow was meant to be excluded from her dower. This judgment was acquiesced in till after the death of the plaintiff, when *A. Lawrence*, the next remainderman, became intitled, who commenced his suit to be relieved against the judgment of dower, but *Lord Cowper* declined to alter, in that respect, *Lord Keeper Wright*'s decree; upon which *Lawrence* appealed to the *House of Lords*, who confirmed *Lord Cowper*'s decree, and consequently that of *Lord Keeper Wright*.

Consistently with the principles before stated, the reasons for the final judgment of the House of Lords appear to have been these: That the devise to the widow of a part of the dowable estates was consistent with her right to dower in the remainder, and that such consistency continued notwithstanding the interests which were given in the two farms, parcels of the lands, not devised to her; because her acceptance of them might not of necessity defeat any of the trusts of the term vested in the trustees, since the remainder of the lands, after the assignment of dower, might be suf-

ficient to pay the debts and legacies in aid of the personalty; hence the implication that the testator intended, by his testamentary dispositions to his widow, to purchase her right to dower in the lands not given to her, was doubtful and conjectural, which is not sufficient to put a widow to an election between her legal title and the benefits that she takes under her husband's will.

The next case that followed and which was determined upon the authority of the last, was the case of *Lemon* v. *Lemon* (*a*), in which the husband devised *part* of his lands to his wife for life, without expressing them to be in lieu or satisfaction of her dower, and the residue of his estates to his brother in fee. The widow recovered her dower at law; to be relieved against which he filed his bill, but it was dismissed.

No implication from devise to widow of part of the lands that it was to bar her dower in the remainder.

From the above two cases, and those of the same class referred to in the notes (*b*), it appears to be established that the devise of an estate to the widow for life, without expressing it to be in satisfaction of dower, is not inconsistent with, and therefore will not oblige her to elect between it and her dower out of *other* freehold estates of her husband, notwithstanding they are bequeathed to other persons; and although she may have devised to her by the same will, interests in or out of those other lands not inconsistent with her legal right to dower, by metes and bounds, and the dispositions made of them by such will.

Except such implication arises from particular circumstances, as inconsistency between the two provisions.

But the terms of the devise to the widow less than expression may raise a sufficiently clear implication of the testator's meaning, that the bequest to her of part of his lands should be in satisfaction of her dower in the remainder of them. In such cases she will be

---

(*a*) 8 Vin. Abr. "Devise," p. 366, pl. 45. (*b*) Hitchin v. Hitchin, Pre. Ch. 133. Brown v. Parry, 2 Dick. 685; and Birmingham v. Kirwan, 2 Scho. and Lefroy, 444, 454.

obliged to elect between the devise to her and such her legal title. An instance of this occurred in the following case (*a*).

There the husband devised all his estates whatsoever to his wife and two children, *B* and *C*, as tenants in common, in equal shares. His property consisted of real and personal estates, which were enumerated by him, and in the event of his wife surviving his children, he gave their shares to her for life, &c. One of the questions was, whether the widow was intitled to dower out of the remainder of the real estates not immediately devised to her? And *Sir William Grant*, Master of the Rolls, determined that she was not.

The principle upon which the above decision was founded, appears to have been that the mode in which the devise was made, raised a clear implication that the testator intended his widow to take what he had given to her under his will only, and no other parts of his estates under any title whatsoever. His Honour conceived, that the direction that all the testator's real and personal estate should be *equally divided* between his widow and children, was inconsistent with her title to dower; for that equality would be defeated if she were allowed in the first place to take a third of the real estates as dower, and then one-third of the two remaining thirds. This case, therefore, seems to be an authority, that if the husband devise his freehold estates to his widow and other persons, as *tenants in common*, without expressing that his wife's share should be in lieu or satisfaction of her dower, she must elect between the devise to her and her legal title.

An instance of which occurs where the devise is made to the widow in common with other persons.

[In *Roberts* v. *Smith* (*b*), the testator gave gavelkind lands to his wife and two other persons, in trust as to one moiety for his wife during widowhood, for the

---

(*a*) Chalmers v. Storil, 2 Ves. and Bea. 222. (*b*) 1 Sim. & Stu. 513.

maintenance of herself and her children of a former marriage, and as to the other moiety in trust for his children. It was held that the equal division of the income intended by the testator was inconsistent with the claim to dower, and that the widow was therefore bound to elect. So in *Dicksen* v. *Robinson* (*a*), the testator having given his real and personal estate to his widow, upon trust for the equal benefit of herself and children, it was held to be a case of election.

In *Miall* v. *Brain* (*b*), the testator devised his real and personal property to trustees, upon trust to permit his daughter to use and occupy a freehold house, part of his property, for her life, and upon other trusts, partly for the benefit of his wife. The Vice-Chancellor observed, that the testator contemplated for his daughter the personal use and occupation of that house, which was inconsistent with the widow's claim to dower out of that part of the property. The house was part of a general devise, and the testator had not given it to the trustees free from dower, unless he had so given the rest of his estate. The testator had shown a plain intention, that the trustees should take such an interest in the house as would exclude the wife's dower, and the same intention must apply to the whole estate passing by the same devise.

So in *Butcher* v. *Kemp* (*c*), the testator having devised a freehold farm to trustees for the benefit of his daughter, with directions to them to carry on the business of the farm, or let it on lease, during the daughter's minority, the Vice-Chancellor held this to be sufficient proof of an intention to exclude the wife from dower.]

As to widow's right to elect to hold in dower *part* of the lands devised to her, and the

The cases above stated and referred to, relate principally to the obligation of the widow to elect between

(*a*) Rolls, 30. April, 1822. (*b*) 4 Madd. 119.
(*c*) 5 Madd. 61.

remainder under the will.

such of the lands as are devised to her by her husband, and her dower in the *residue* of his estate; but they say nothing as to the question whether, when the whole of the lands are devised to her, she may take two-thirds of them as a purchaser under the will, and the remaining one-third under her title to dower. The principle, however, upon which the cases last mentioned and referred to were decided, appears equally to apply to this subject. There is no more inconsistency between the widow's right to dower in the lands devised to her, and her interest in them under the devise, than in the above cases. The husband might intend that she should take no other interest in the lands bequeathed to her than under his will, or he might mean to pass to her his interest subject to her title to dower. His intention is dubious; which is not rendered more clear from any inconsistency between the concurrent enjoyment of her two rights, the one under the will, and the other by the provision of the law. For want, therefore, of this clear implication of intention from the contents of the will, that the testator intended what he had given to his widow should be held and enjoyed under his will and by no other title, it would seem that she may, in general, elect to take the lands devised to her both under the will and her title to endowment. This may be of great advantage to her, when her husband dies in embarrassed circumstances; for as to one-third of the estate, she would enjoy it under a paramount title free from his incumbrances during the marriage, as it has been before shown (*a*); and for the other two-thirds she would be liable to contribute with the owners of the remainder of the lands, in discharge of the incumbrances.

Her advantage in being permitted to exercise this right.

But the terms of the devise to the widow, less than expression, may in this case, as in *Chalmers* v. *Storil*,

(*a*) *Supra*, p. 411.

raise a sufficiently clear implication of the testator's meaning, that he intended her to take wholly under his will in exclusion of her title to dower, for the same principle governs all the cases. An instance occurred in the case of *Birmingham* v. *Kirwan* (*a*), which was as follows:

The husband being seised in fee of considerable real estates, devised them to trustees in trust by sale or mortgage, or out of the rents and profits to pay debts, &c. in aid of his personal property; and as to his demesne of about seventy acres, with his house, offices, and garden, to permit his wife to hold and enjoy them for her life at the yearly rent of thirteen shillings for each acre of the demesne, exclusive of bog, she keeping the house, offices, and garden, in perfect repair, and not to let them except to the persons in remainder. The residue of his lands, subject to the payment of his debts and legacies, as aforesaid, he devised to other persons. The testator was greatly indebted at his death to creditors by *elegit*, who took possession of the lands not devised to the widow. She also entered upon the demesne, house, &c. bequeathed to her for life; and afterwards recovered her dower at law out of the residue of the lands. The question was, whether, under the circumstances, she was intitled to any dower, and of what? And *Lord Redesdale* decided, in conformity with *Lawrence* v. *Lawrence*, and the other cases of that class before referred to, that the devise of part of the lands to the widow did not bar her right to dower of the remainder of them. But his Lordship was of opinion that, under the terms of the devise, and the dispositions in the will, she could not claim dower in the house and demesne, and also the interest in them

---

(*a*) 2 Scho. and Lefroy, 444. To the same effect, see the case of Lord Dorchester v. Earl of Effingham, Coop. C. C. 319.

given to her by the will, since the enjoyment under the two titles was inconsistent under the circumstances of the case; 1st, because the rent of thirteen shillings *per* acre was issuable out of the *whole* house and demesne, which could not be if the widow were entitled to endowment out of them; 2dly, because she was to keep the premises in repair, and not to alien them except to the persons in remainder; directions which applied to the *whole* of the estate devised to her, but quite incompatible with the right of a person claiming title by dower, a title paramount to them, in one-third of the estate; 3dly, since if the widow brought a writ of dower against the trustees as devisees, in respect of the house and demesne, and was to have a third part set out to her, they could not execute the trust reposed in them of permitting her to enjoy the *whole* under the *will*, *one-third* being recovered against them; 4thly, because the trustees could not, in the event last supposed, reserve an acreable rent on the *whole*, and of the rent to be reserved she could not have dower; 5thly, for since the widow must admit the right of the trustees to the *whole* house and demesne, for the purpose of having the demise made to her under the will, her title to dower would involve this contradiction, that she must dispute their title as to one-third of the whole; and, lastly, because if the widow had entered upon the whole house and demesne under a lease from the trustees, before bringing her writ of dower, she must have demanded dower against her own title, and avoided the leases as to one-third. Under all these circumstances, his Lordship considered the implication clear, that the husband intended his wife should enjoy the *whole* of the house and demesne under a right created by the will, and not parts of them under a right which she had previously to it, and the remainder under the will.

In the last case it is observable that the interest in the estate devised by the will, and the title to dower,

were contemporary and inconsistent. Such two titles, therefore, meeting together could not co-exist without the one infringing upon the other; hence arose a clear implication that the testator could not intend to pass to his widow merely what he was empowered by law to transfer, viz. part of his estate subject to her right to dower.

The implication, will not arise upon a limitation to the widow in *remainder* of the dowable estate.

If the interest devised to the widow in the estate be not *in presenti*, but *in futuro*, she may enjoy the one in consistency with the other, and there arises no clear implication of an intention from the devise of such an interest, that the testator meant by it to exclude her immediate title to dower. The result therefore is, that a sufficient case will not be made to put the widow to elect between her present title to dower in the lands, and her future interest in the same under the will.

Thus, in *Incledon* v. *Northcote* (*a*), the wife was intitled to a portion of 5000*l.*, charged upon her father's property, which her husband extinguished, and made no settlement upon her. Of the estates of which he died seised, his widow was only intitled to dower out of one called the *Northcote* estate. By his will he devised his real and personal estates to trustees, in trust as to particular parts of them for his wife for life, and in trust as to his residuary personal estate and his real estates to pay his debts, and then to raise 5000*l.* for children's portions; and as to his real estates to the use of his first and other son and sons successively in tail, remainder to the use of his daughters, with remainder to the use of *his wife* for life. The testator added a codicil to his will, which formed no ingredient in the Court's judgment upon the widow's claim to dower of the *Northcote* estate. To this claim of the widow it was objected that the devises in the

(*a*) 3 Atk. 433.

will in some measure clashed, and were inconsistent with it; because the testator gave to her the *very* estate in *remainder* out of which she demanded dower, so that she ought to take either totally under the will, or totally to reject it. But *Lord Hardwicke* said, that nothing was given to her by the will except a specific legacy of personal estate, and a *remainder* for life in her husband's real estate, in default of issue male and female by himself. And he was of opinion, that there was no such inconsistency between the widow's title to dower and the dispositions made by the will, as to lay her under the necessity of electing between her legal right and the remainder devised to her in the same estate of which she claimed dower, or the other benefits given to her by the will.

Nor even when the estate is given to the widow and other persons as trustees to sell, &c.

In conformity with the principle before mentioned, although the dowable estate be devised to the *wife* and other persons as *trustees* for sale, and the proceeds are directed to form parts of the testator's personal estate, and benefits are given to the widow out of the funds so constituted, yet there will be no implication arising from these circumstances sufficiently clear to oblige the widow to elect between her testamentary provisions and dower in the lands, on the ground of inconsistency. This was expressly so decided by *Lord Alvanley* in *French* v. *Davies* (*a*).

The testator devised to trustees (his wife being one of them) all his freehold estates to sell, with a direction that the proceeds were to form parts of his residuary personal estate. He then gave to her leasehold premises and a variety of articles of household goods, &c. and a legacy of 100*l*., with liberty to reside in his mansion-house, and if she declined to do so, he ordered it to be sold and the money to be applied as the produce of his freehold estates. He also gave to his wife

---

(*a*) 2 Ves. jun. 572.

the interest of 2000*l.* *durante viduitate*; but if she married, then half of the principal was to fall into his residuary personal estate, and the interest of the other half was to be paid to her separate use. The trustees were also to permit her the enjoyment during widowhood of his plate, &c. which were to be sold after her death or marriage, and the proceeds applied as the produce of his freehold and leasehold estates. The testator then directed his trustees to place his *residuary* personal estate at interest, and to transfer one-eighth part of the capital to three of his adult children, and to apply the interest of the remainder for the support of his infant children till 21 or marriage, and then to transfer to them the capital. Benefit of survivorship was given amongst them, in the event of all of them, except one, dying before the residue could be ascertained or their shares became payable; but if all of them died before the happening of either of those events, he gave the whole of his residuary estate to his *wife* and *B* and *C* absolutely in equal shares. The principal question was, whether the widow should be compelled to elect between the benefits given to her by the will and her dower out of the freehold estate, which was sold with her consent? And *Lord Alvanley*, M. R., determined that she was intitled to dower, and also to the provisions made for her by the will.

The ground for the foundation of the last decree was, that none of the dispositions in the will raised an implication of clear intention in the testator to exclude his widow from dower. The direction for a sale of the freehold estate was not obstructed by her legal claim to endowment, for she might, as she did, take a compensation out of the purchase-money on account of it. The dispositions in the will were not defeated by her demand of dower, because the legatees took so much of the produce of the freehold estate as the testator had a right to dispose of, and they were in justice intitled to no more. And with respect to the

principles applicable to these cases his Honour said, that the husband's *ignorance* of his wife being intitled to dower was not sufficient to put her to an election; that it was not enough to contend that he did not intend her dower, because she had no occasion for any such intention, since her title depended upon the gift of the law; but that it was necessary to prove from the will that he meant to *exclude* her from dower, evidence of which would be inconsistency between her exertion of that right and the dispositions in the will.

As to widow's election between dower and rents devised to her.

2. The subject proposed secondly to be considered was, the effect of testamentary dispositions of rents or rent-charges granted by the husband to his wife out of the dowable estate, in obliging her to elect between such rents and her dower of the lands.

To the cases upon this division of the subject the same principles must be applied as have been before stated. In order to oblige the widow to elect between the rent or annuity devised to or in trust for her, and her dower of the lands charged with it, a clear implication must arise from the will and the provisions contained in it on the ground of inconsistency between them and the title to dower, that the latter was intended to be purchased by the former, and that the benefits under the will were meant to be the only interests which the widow should have or be intitled to in the premises.

A mere gift to trustees, or devise of a rent out of the estate to the widow, will not put her to election.

A mere gift to trustees of the dowable estates does not of itself raise the implication that the dower of the wife was intended to be barred (*a*). And it is conceived that a devise of an annuity or rent-charge to her out of the dowable estate, whether secured or not by an express clause of entry and distress, will not have that effect, since it does not, as is presumed, manifest a clear implication of the testator's intention that his

(*a*) 2 Scho. and Lefroy, 453. 3 Bro. C. C. 347.

widow should take no other interest in the lands charged than that given by the will, for there is no inconsistency between the enjoyment under the devise and the assignment of dower. The widow may have her dower assigned of one-third of the estate, and receive her annuity or rent-charge out of the remainder (*a*). It is no objection to say that the rent-charge or annuity and the remedies provided for payment of it were given and secured out of the whole of the estate, which the widow defeats by having her dower of a third of the lands assigned to her, and thence to raise an implication that she was not intended to have both; because the husband might be, or he is supposed to be, acquainted with his wife's title to dower affecting his estate, and he may have meant, in charging it with the annuity or rent-charge, to have done so subject to his wife's title to dower, *i. e.* to charge the interest which he had in the property to the extent only of such interest, leaving his widow's title to dower untouched. Hence it appears, that the implication of intention to exclude the right to dower, by the grant to the widow of an annuity or rent-charge out of the dowable estate, is at least *equivocal;* it does not amount to that clear and certain manifestation of intention as we have seen to be necessary to oblige the wife to elect between the provision under her husband's will and her dower. Upon the same reasoning, if after the devise of an annuity to the widow out of the dowable lands the testator expressly bequeath them to *A* by the terms, "all my estate subject to the charge aforesaid," still the widow will not, as it would seem, be obliged to elect between her dower and the annuity, because the intention of the testator to exclude dower still remains dubious, since by the words, "all my estate," he may only intend to pass to *A* such interest

Nor will a disposition of all the testator's estate subject to the rent or annuity have that effect.

(*a*) 1 Bro. C. C. 292.

as he has the power to dispose of, *i. e.* subject to the widow's title to dower; and then the subsequent devise of the lands, subject to the annuity, referring to such interest, raises no implication of clear intention from inconsistency between the right to dower and the limitation of the estate, as to render it necessary to oblige the widow to elect between her annuity and dower (*a*).

Parol-evidence.

And it is presumed that *parol*-evidence is inadmissible to explain the words of the will by showing that the testator meant by them to pass dower, the effect of which, if admitted, would be to put the widow to election (*b*).

How far the cases support the above observations, the reader will decide.

The several cases considered.

In the case of *Pitts* v. *Snowden*, very briefly stated in a note to *Mr. Browne*'s Chancery Reports (*c*), the husband devised to his widow an annuity of 50*l.* payable out of his freehold and copyhold estates, to be made good out of his personal property; and subject to the annuity he devised the premises to his children, &c. For securing such annuity, powers of entry and distress were given; and *Lord Hardwicke* decided that the widow was intitled to both her dower and the annuity.

In this case it is observable that the annuity did not issue out of the dowable estate alone, but out of a *mixed* fund, consisting of copyhold and freehold property; a circumstance relied upon in some of the cases after mentioned. Hence the implication that the annuity was intended in lieu of the widow's claim upon only *one* of the funds charged was weakened, since an inference arose from that circumstance, that the widow

---

(*a*) See 2 Ves. jun. 580. See Sir William Grant's observations in Chalmers v. Storil, 2 Ves. and Bea. 225. (*b*) Stratton v. Best, 1 Ves. jun. 285. *Contra*, Druce v. Denison, 6 Ves. 385. *Vide*, Doe v. Chichester, 4 Dow. 65, and Doe v. Jersey, 3 Barn. and Cress. 870. (*c*) 1 Vol. 292.

having no su claim upon the copyhold as she had upon the fhold estate, and both being equally charged with e annuity, the testator, in making such grant and clge upon both of them, intended the annuity as a unty to her, and not as a condition to her giving upny right or claim upon *one* fund, viz. his freehold este. Whether *Lord Hardwicke* determined the casupon the above distinction does not appear. It is hvever presumed, for the reasons stated previously to tl introduction of the case, that if the charge of the anity had been confined to the freehold property, the wow would have been intitled both to the annuity and er dower, and that no case of election would have beenised.

The case whicfollowed was that of *Arnold* v. *Kempstead*, before *Ld Northington* (*a*). There the husband bequeathedo his wife two *leasehold* houses for life, also an annui of 10*l.* *durante viduitate*, out of the rents of freehold states in which she was intitled to dower. Subject t the annuity, he devised the freehold property to ' for life, remainder to *B* in fee. There were not ar clauses of entry and distress for the arrears of the anuity. The question was, whether the widow was intitd to dower and also to the annuity, or was obliged to elt between them? And his Lordship decreed that sh ought to elect, observing that it was the manifest intention of the testator to give her the annuity in satisfation of dower, and that the latter claim was in contradtion to the will.

The case of *Pitts* v *Snowden* does not appear to have been cited in *Arnold* v. *Kempstead*. Between the two cases these difference may be remarked, that in the latter the annuity is given solely out of the dowable estate, and without an powers of entry and distress. But how the annuity n the case of *Arnold* v. *Kemp-*

(*a*) 2 Eden, 36. Ambl. 466, S. C.

stead contradicts the will, more than the annuity in *Pitts* v. *Snowden*, it is difficult to discover. With respect to the testator's intention it may be observed, that in granting the annuity out of the freehold estate he might mean no more than to charge each estate to the extent of his interest therein, viz. subject to his widow's right to dower of one-third part of it, and then all inconsistency between the two claims is obviated. At least it is presumed that there is not in this case that clear and certain implication of the testator's intention to purchase his wife's title to dower by the grant of the annuity, as is required by the cases to oblige her to elect between her interest under her husband's will and her legal right to dower.

The next case is *Villa Real* v. *Lord Galway*, before *Lord Camden*, fully reported in a note to *Browne's* Chancery Cases (*a*). The husband devised to his wife an annuity of 200*l.* for life, and subject thereto he gave all his real estates, and also his personal estate, to *trustees*, to preserve contingent uses of the real, and for those purposes to make entries but to permit his daughter, or her trustee, during her life to receive the rents of *all* the premises for her benefit, and to *let the same* at the best rents, without fine with remainder to the heirs of her body, &c. Powers of entry and distress were given to recover the arrears of the annuity. The question was, whether the widow was intitled to dower, and also to the rent-charge, or was bound to make an election; and his Lordship was of opinion, under all the circumstances, that she ought to elect.

It must be noticed, that the last case is no authority; for the proposition that a mere devise to the widow of a rent-charge issuing out of the lands in which she is dowable, raises a sufficiently clear implication that her husband (the testator) intended that she should be put

(*a*) Vol. I. p. 292.

to elect between such rent and her dower; so that it does not sanction the case of *Arnold* v. *Kempstead*, nor is it contrary to *Lord Hardwicke's* decision in *Pitts* v. *Snowden*, both before considered; but it coincides with the decree of *Lord Redesdale* in *Birmingham* v. *Kirwan*, before also stated (*a*). The present case was determined upon the particular circumstances: the lands were devised to trustees, and two obligations were imposed upon them; viz. to permit the daughter, or her trustee, to receive the rents of *all* the lands during her life, and also to *demise* the *whole* estate at the best rent. If, then, the widow had assigned to her in dower one third of the estate, the trustees could neither permit the daughter or her trustee to receive the rents of *all* the estate, nor let the whole of it; their lessee could not enjoy the *whole* of the premises under their demise, as was directed by the will. These circumstances were abundantly sufficient to raise a clear and unequivocal implication, from the inconsistency between the rent-charge issuing out of the dowable lands, the claim to dower by metes and bounds, and the limitations contained in the will. That such were the true grounds upon which *Lord Camden* decided the case, was the opinion of *Lord Redesdale* in the before-mentioned case of *Birmingham* v. *Kirwan* (*b*); "For," said his Lordship, "my recollection of the manner in which *Villa Real* v. *Lord Galway* has always been treated, is, that the claim of the annuity was utterly inconsistent with the claim of dower; that the directions in the will with respect to the management of the *whole* estate, the payment of the annuity, and the accumulation during the minority of the child, were *inconsistent* with setting out a third part of the estate by metes and bounds, and therefore *Lord Camden* thought the *implication manifest*, that the testator did intend the annuity as a provision in bar of dower."

(*a*) *Supra*, p. 593.

(*b*) 2 Scho. and Lefroy, 453.

The case of *Villa Real* v. *Lord Galway* was followed by *Jones* v. *Collier* (*a*), before *Sir Thomas Sewell*, Master of the Rolls, in which the husband bequeathed to his wife, for life, his dwelling-house in *C*, household goods, &c., and he charged all his freehold estate at *C*, with an annuity of 40*l*., to be paid quarterly to his wife for life, with power to distrain for the arrears: he also charged the estate with a like annuity for his nephew *B*, with a similar power of distress; and he then devised the premises given to his wife for life, from her death, and also all his freehold estates so chargeable as aforesaid, and all other his real and personal estates, to trustees, until his grand-niece *D* attained the age of twenty-five, and then to her absolutely. He directed his trustees to allow and apply the *surplus of the rents and profits* of his said estates, subject as aforesaid, for *D*'s maintenance and education until she attained her above age. He then directed his trustees to complete a contract he had entered into for the sale of part of his estate, and to lay out the money to the same uses which he had limited of the lands by his will. Under these circumstances, *Sir Thomas Sewell* decided that the widow should elect between the benefits in the will and her dower.

It appears from the report, that the foundation of this decree was an intention implied from the direction of the surplus rents, subject to the annuities, to be applied for the *maintenance* of *D*, and from the inference that when the testator entered into the contract for sale of part of his estate, he conceived that he had power to sell it free from dower. But these reasons do not appear to be satisfactory; for the supposed inconsistency between dower and the direction as to the surplus rents must be removed if the testator be considered (as he *primâ facie* ought), to pass no other interest in the

---

(*a*) Ambl. 730.

ests to *D*, than he had the power to dispose of, and thhe term *surplus* rents will consistently refer and ap not to the whole, but to the two thirds of the ests of which he had the power of disposition; so thhis direction and disposition, and the assignment ofwer by metes and bounds, are consistent with each ot and do not raise that clear and unequivocal implion of intention in the testator, that his widow shd forego her legal right for the interests given to hey the will (*a*). And with respect to the inference to drawn from his entering into a contract for the saf part of the estate, that is also ambiguous, for he mt not have had his wife's title to dower in contemphn, and therefore no intention to deprive her of it, ane might have intended to have sold the lands subjeto dower, or the widow might have concurred in thale upon having part of the purchase-money paid tor settled upon her, in compensation of her legal ri (*b*). This case, therefore, seems to be one of the west in which the widow was put to election, and it isesumed that a similar case, occurring at present, wd not receive the same determination.

he next case which occurred upon this subject was *Pson* v. *Pearson* (*c*). There the husband devised ause and ten acres of land to his son, subject to a rcharge of 10*l.* a year to his wife for life, and of 5*l.* aar to his brother. Question, whether the widow wintitled to the annuity and also to her dower? *Ld Rosslyn* decided that she was intitled to both, u the principle that there appeared to be no inconsncy between the right to dower and the rent-charge, ne dispositions in the will.

lis Lordship, however, considered that if the estate ve insufficient to satisfy the annuities and dower, Whether the circumstance of the land charged with widow's annuity being insufficient to answer it and dower, will

) 3 Bro. C. C. 347. (*b*) 2 Ves. jun. 577. (*c*) 1 Bro. t. p. 292.

raise a case of election—*Qu.*

such circumstance would be sufficient to raise the cessary implication that the widow was not intende have the provision in the will and her dower, an inquiry was directed to ascertain the fact. The pre is the first case in which such an inquiry was direct and in *French* v. *Davies* (*a*), the Master of the F said, that although *Lord Thurlow* thought that would not have made such a reference, yet he was willing to assent to that; he admitted, with his L ship, that nothing was so dangerous as to constru will by extrinsic circumstances, unless it were so c as to exclude all doubt, but that the doctrine of elec was much more an argument of conscience than thing else; it would therefore be unconscientious in widow to claim both under the will and also her dov if there was an irresistible presumption that it against the testator's intention; for which reason seems his Honour presumed that cases of election w exceptions to the general rule, that no inquiries ou to be directed, nor evidence permitted to lay a foun tion for determining contrary to what appeared up the face of the will. His Honour's conception up this subject appears to have been confirmed by *Lo Eldon*, in *Druce* v. *Dennison* (*b*), who there det mined after mature consideration, that evidence in sense *parol*, viz. a statement of property in the testato hand-writing, and his books of account, were evider admissible to show that under a devise of his *real a personal estate* he intended to pass property not strict his own, viz. personal estate which belonged to wife.

I shall now advert to the next case in successio *Wake* v. *Wake* (*c*). There the husband devised all h

---

(*a*) 2 Ves. jun. 580. (*b*) 6 Ves. jun. 385; sed vide Strat v. Best, 1 Ves. jun. 285, *ante*, p. 590, and Doe v. Chichester, ci thure. (*c*) 1 Ves. jun. 335, and 3 Bro. C. C. 255, S. C.

estate and effects upon trust (subject to an annuity or rent-charge of 35*l.* to his wife, for life) for his son by a former wife, whom he made residuary legatee: upon the question of the widow's election, *Buller*, J., sitting for the Chancellor, decreed that she was not intitled to both her annuity and dower. The point does not appear to have been much considered, and the case was decided upon the authority of *Jones* v. *Collier*, before stated, but neither *Pitts* v. *Snowden*, nor *Pearson* v. *Pearson*, were mentioned. This case, therefore, being little, if at all argued, and being determined by a judge not very conversant with the rules of Courts of Equity, it is presumed that it cannot be produced to shake the decisions in the two former cases of *Pitts* v. *Snowden*, and *Pearson* v. *Pearson*.

The case that shortly followed the last determination was *Foster* v. *Cook* (*a*), which is expressive of *Lord Thurlow*'s opinion upon the propriety of the judgment given in *Wake* v. *Wake*. The husband being seised of freehold messuages, &c., and possessed of leasehold and other personal property, devised to trustees all his real and personal estates, upon trust to pay his wife an annuity of 50*l.* *durante viduitate*; but if she married, to pay her an annuity of 30*l.* only. The trustees were to permit her to have the use of his mansion-house, and the furniture in it, at her election, whilst single; and he directed that the child with which his wife was *encient* should be brought up by her until the age of twelve years; and that the trustees should improve and manage his real and personal estates in the best manner, for such child, and its support and maintenance. He then gave to the child, when arriving at the age of twenty-five years, all his real and personal estates, charged with the payment of the widow's annuity; and he directed his trustees with all convenient

(*a*) 3 Bro. C. C. 347.

speed to possess themselves of all his estates and substance, and to improve the same for the benefit of his child. It was one of the questions in the cause, whether the widow was intitled to her dower and the annuity; and *Lord Thurlow* was of opinion that she was intitled to both.

The above case resembles in its circumstances some of the authorities before stated. The annuity in it is charged upon a mixed fund, as in *Pitts* v. *Snowden*, and it supports the decisions in that and the case of *Pearson* v. *Pearson*; it is also quite consistent with the case of *Villa Real* v. *Lord Galway*, although in some particulars resembling it. In both, the devises were to trustees to receive the rents and manage the estates for the benefits of the devisees; but here the concordance ceases, for in the present case there was no direction that the trustees should *demise* the premises, as in *Villa Real* v. *Lord Galway*; so that *Lord Camden*, for the reasons before stated in the consideration of that case, considered the implication clear and satisfactory, that the widow could not have been intended to take her dower in contradiction to the will. But in *Foster* v. *Cook* there is no such inconsistency; for under the presumption that the testator only meant to dispose of the interest which he had in his real estates, i. e. the inheritance subject to his widow's title to dower, all his testamentary dispositions may take effect, although the widow have her dower assigned by metes and bounds.

The last case which has occurred upon this subject is *Greatorex* v. *Cary* (*a*). The bequest by the husband was of 150*l.* a year to his widow, *durante viduitate*, which he ordered his executors to pay half-yearly, out of his real and personal estates; and he directed his personalty to be placed out at interest, to assist his real

---

(*a*) 6 Ves. jun. 615.

estate in the payment of the annuity, or so much at least of his personal estate as should be necessary for that purpose; and he desired the first payment of the annuity to be made in six months after his death. He then gave to the widow his household furniture, &c.; and in the event of her dying without leaving a child, he devised to his sister his residuary real and personal estates. Upon the widow's claim of her annuity and dower, *Lord Alvanley* determined on the authority of the last case, and the principle before stated, that she was intitled to both of them.

Corollary from the preceding cases.

The reader probably will have drawn the following corollary from the review of the preceding cases, taking also into his consideration the bias of Courts of Equity in favour of the widow's claims,—that whether an annuity or rent-charge be given to her out of the *particular* estate in which she is intitled to dower, or out of that estate enumerated amongst other property, she will be intitled to both provisions, unless, in the first case, the estate is insufficient to pay the annuity and to answer her dower; from which circumstance the intention would be apparent that her husband did not mean that she should be at liberty to enforce both her claims: and unless, in the second case, when upon a consideration of the whole will, such an inconsistency appears between the provisions or limitations in it, and the right to dower, as to make the intention *manifest* and *indubitable*, that she was not to have the benefits intended for her by the will, together with her dower.

Before leaving this subject, I must advert to the case of *Boynton* v. *Boynton* (*a*); a middle case between expressions short of direct affirmation that the provision should be in bar of dower, and when nothing is mentioned on the subject.

In that case, the husband, after giving to his wife

(*a*) 1 Bro. C. C. 445.

for life, his mansion-house, &c., and some legacies, devised to her an annuity of 1000*l*., charged upon his real estates not bequeathed to her, and in lieu of dower; but this grant and the legacies were declared to be void if she married again, and in that event he gave her an annuity of 100*l*., similarly charged, "in full for every benefit and advantage which he meant should arise out of any of his real or personal estates, in case she should marry again." The widow, in an answer to a suit, elected to take her dower, and afterwards married; upon which a supplemental bill was filed, and she claimed, by her answer, both her dower and the annuity of 100*l*., notwithstanding her prior election; but *Lord Thurlow* said, that the terms in which that annuity was given were tantamount to express declaration that she should not have dower, and that having married again, and elected her dower, she had no title to the annuity of 100*l*., and he decreed accordingly.

Widow not bound to elect till the property in which she is interested, and the relative values are ascertained,

In instances where the widow is bound to elect between her jointure or dower, and the benefits given to her by her husband's will, she is intitled to have the values and amounts of her two interests ascertained before she elects between them; she may therefore file a bill in equity for the ascertainment of those interests (*a*); for election cannot satisfactorily be made between the two estates, until the person electing actually knows their relative values; and no rational inference arises prior to that period from the receipt of either, that the party meant to elect and accept the one in preference to the other; so that if the widow receive an annuity or rent-charge under her husband's will, and remain ignorant of the value of her dower, such receipt will not preclude her right of election when that value is ascertained (*b*). An instance of this occurred in *Wake*

(*a*) Newman v. Newman, 1 Bro. C. C. 186. (*b*) See Pusey v. Desbouvrie, 3 P. Will. 315. Rumbold v. Rumbold, 3 Ves. 65.

v. *Wake* (*a*). There the annuity had been received by the widow for *three* years after the death of her husband, yet the Court held that her right of election remained open: and in *Butricke* v. *Broadhurst*, after stated, *Lord Rosslyn*, in observing upon the case of *Lord Beaulieu* v. *Lord Cardigan*, finally decided in the House of Lords (*b*), in which the right of election continued *fifty years*, said, "all that was decided by the case was, that under circumstances, election may continue till the whole affair be wound up, and the trusts executed."

except when the funds are free and clear from the beginning.

But the principle is inapplicable when the amounts of the two rights are clear, or may be easily discerned after the husband's death; for in such a case the widow's acceptance of the bequests given to her will be an irrevocable election to abide by the will, and to forego her dower.

Thus in *Butricke* v. *Broadhurst* (*c*), the husband by will (of which he appointed his wife sole executrix) devised to trustees all his real and personal estates, in trust to permit his wife to receive the rents and profits for her life, provided she did not marry. The trustees never acted. She received the rents for *five* years after her husband's death, and then filed a bill claiming to elect an interest for life in a trust fund of 2000*l*., under her marriage articles, instead of the property under the will, between which she was under the necessity of electing; but *Lord Thurlow* was of opinion that there was no foundation for the suit, observing that the widow having taken possession under the will, and the estate being a *free fund from the beginning*, he could not think of a principle upon which the Court would say that she was then competent to elect. He further observed, and expressed his wish of being understood,

---

(*a*) 1 Ves. jun. 335. Ambl. 533, S. C.

(*b*) 3 Bro. Parl. Ca. 277, 8vo. edit.

(*c*) 1 Ves. jun. 171. 3 Brown C. C. 88, S. C.

that his judgment was founded upon the particular circumstance that the bill was filed without any ground, and *no suggestion* that the real or personal estates were in such a situation as to render it doubtful what the result would be, and consequently that the widow had laid no ground which intitled her to elect, after an acquiescence and enjoyment for five years.

It appears from the last case, that the widow could not be unacquainted with the annual amounts of either fund, since that under marriage settlement was specified and certain; and she could not be ignorant of the yearly value of the rents and interest of her husband's real and personal estates, after receiving them for five years from his death. Under such circumstances, it would have been an abuse of the general principle to have extended it to such a case as the present.

But the widow will be relieved against her election, when made under a mistake.

If, however, the election be made by the widow under the supposition that the estate devised to, and accepted by her, was free from all claims and demands, when the fact is the reverse, then such election will not bind her, because it was made under a mistake, in ignorance of the real state of the property, against which she is intitled in equity to be relieved: an instance of this kind occurred in the case of *Kidney* v. *Coussmaker* (*a*).

There the husband, after marriage, purchased a freehold estate, which he limited by deed in remainder to his wife for life, after his own death: he then by his will made several devises and bequests in favour of his wife of freehold and leasehold lands, &c., expressing them to be in bar of dower, and directing her to release his trustees from it. Some of the freehold estates to which the right of dower attached were sold under the trusts of the will. When the above purchase was made, the wife considered her husband to be possessed of large

---

(*a*) 12 Ves. 143—153.

property, and not otherwise indebted than in the ordinary course of business: under such impression, and the persuasion that she should enjoy the full benefits of the provisions made for her by settlement and the will, she released the trustees from her dower; and it was declared in the deed that it was not to bar or affect those provisions. The testator, her husband, was greatly involved in debt at his decease; to satisfy the whole of which it became necessary to resort to the estates devised by him to his wife: she therefore insisted, that although she had released her dower as above, yet as she did so under the belief that she should have enjoyed the benefits given to her by the will and the settlement, free from all claims and deductions, she was not bound by the release, but was at liberty to claim her dower, or a compensation for it, in all the freehold or customary estates of which her husband was seised of an estate of inheritance at his death. And *Sir William Grant*, Master of the Rolls, determined that the wife was not bound by her election, since it was made under a *mistaken* impression that her husband's creditors would make no claim upon the estates devised to her, and that she was therefore intitled to enforce any of her legal rights, and to an inquiry for that purpose of the estates in which she was intitled to dower.

The consequence of the widow's success in this suit would be, as it will occur to the reader, to defeat the remedies of all such creditors whose debts were contracted after marriage, against such parts of the freehold estates as she was intitled to hold in dower, since her title had relation to the marriage, and was therefore paramount to their claims.

CHAPTER XII.

THE WIFE'S POWER OVER HER HUSBAND'S REAL ESTATES.

In preceding parts of this treatise references have been made to this chapter in regard to the provisions which the law has made against wrongful alienations by widows of interests acquired by them in their husbands' real estates, either by operation of law or by gifts or settlements from their husbands; and the discontinuance of the wife's estate by the husband, and the remedies provided against it, having been detailed in a former chapter (*a*), the subject now necessary to be considered is the DISCONTINUANCE of the husband's estate by the wife after his death, and which it is proposed to treat of under the following sections and subdivisions:

I. *Of the alienations by dowresses and jointreses whose interests are for* life *only, and the remedies provided against their tortious conveyances.*

II. *Of the alienations by jointresses whose provisions were given or settled upon them in* tail, *and the remedies provided against their discontinuances; and particularly by statute* 11 *Henry* 7, *chap.* 20, *and it is proposed in commenting upon that statute to consider—*

1. *What estates and interests come within its provisions.*

(*a*) Chap. ii.

2. *What estates and interests are not within its provisions.*
3. *What alienations by widows are and are not forfeitures, and,*
4. *Of entries under the statute, and when such rights are destroyed.*

III. *Of the effect of the statute upon the practice of Courts of Equity in decreeing a specific performance of marriage articles.*

I. As to the alienations by dowresses and jointresses whose interests are for life only; and the remedies provided against their tortious conveyances.

Effect at common law of dowress or a jointress for *life* aliening in fee, in tail, or for the life of the alienee, with warranty.

If a dowress or a jointress, tenant for life, aliened the estate by a conveyance at common law for the life of the alienee, or in tail, or in fee, it was a forfeiture of her estate; and her heir might have entered upon the lands and defeated the title of the alienee; but if the widow or jointress had annexed a warranty to the conveyance, and the heir omitted to enter during the widow's life, the title of the alienee would have been complete, for the warranty of the heir's ancestor descending upon him was an estoppel to his claiming the estate in consequence of the legal presumption arising from his neglect to enter upon the alienee during the life of the widow or jointress, that he, the heir, had received an equivalent in value for the lands; that presumption, therefore, which was not allowed to be repelled by contrary evidence, precluded the heir from recovering the estate itself (*a*).

Legislative remedies.

This legal fiction being attended with great injustice to the heir, the legislature first began to apply a remedy in the instance of such alienations by tenants by the curtesy; and the statute of Gloucester (*b*) was passed, by which it was enacted, "that if a man aliened

6 Edw. I. c. 3.

(*a*) Co. Litt. 365 *b*, 367 *b*. Vaug. Rep. 391. (*b*) 6 Edw. I. chap. 3.

a tenement which he held by the law of *England*, his son should not be barred by the deed of the father (from whom no heritage descended) to demand and recover by writ of *mort d'ancestor* of the seisin of the mother, although the deed of his father doth mention that he and his heirs be bound to *warranty*." But this statute bound the heir if he had at any time assets from his father; and it declared that the heir of the wife should not be barred of his action after the death of his father and mother by the deed of his father, if he demanded by action the inheritance of his mother, in a writ of entry, which his father aliened in the time of the mother, whereof no fine was levied in the king's Courts. It would seem, therefore, that the fine or recovery of tenant by the curtesy was not provided against by the above act.

That statute having in some measure relieved the heir from the alienations of his father tenant by the curtesy of the mother's estate, it was immediately followed by another act (*a*) to preserve the husband's estate for his heir, or the person in reversion, against the disposition of it by the widow holding it in dower. By that statute it is declared, "that if a woman sell or give in fee or for term of life the lands that she holds in dower, the heir or other person to whom the land ought to *revert* after the death of such woman, shall have *present* recovery to demand the land by a writ of entry made thereof in Chancery." The two last statutes appear to have been made solely for the benefit of the heir and the person in reversion, but the next statute which was passed, viz. the eleventh of Henry the seventh (*b*), seems to have extended its provisions not only to the heir, but to the persons to whom the lands in *jointure* within that act (*c*) should belong

6 Edw. I. c. 7.

11 Hen. VII. c. 20.

(*a*) 6 Edw. I. chap. 7. (*b*) Chap. 20. (*c*) See *infra*, Sect. 2. pl. 4.

after the widow's death (*a*). It also includes tenants in dower, and tenants for life *ex provisione viri* (the latter of whom were not comprised in the other statutes before mentioned), and it gives rights of entry to the persons beneficially interested in the estate. Its clauses are particularly framed so as to remove the effects of the widow's discontinuance of her husband's estate, as will afterwards appear when the statute is considered in detail.

The last statute applicable to the present subject is the fourth of Anne (*b*), which declares, "that all warranties that shall be made after the first day of *Trinity* term by *any* tenant for *life* of any lands, tenements, or hereditaments, the same descending or coming to *any* person in reversion or remainder, shall be void." 4 Anne, c. 16, s. 21.

The effect of these several statutes seems to be, to exclude the bar created by the warranty at common law, leaving to the persons intitled to the estate subject to dower or curtesy, or the widow's jointure for life, the same right of entry as they would have had if no such warranty had existed.

II. We shall next proceed to treat of the alienations by jointresses whose provisions were given or settled upon them in tail, and the remedies provided against their discontinuances, and particularly by stat. 11 Henry 7, chap. 20, before referred to.

It must be remarked that what has been previously said applies only to tortious alienations by dowresses, tenants by the curtesy, and jointresses for life. In cases where the widow was seised of an estate tail *ex provisione viri*, she, as any other tenant in tail, might, previously to the statute of Henry the seventh, have barred the issue by a fine; and not only the issue, but the persons in remainder or reversion, by a common

---

(*a*) Co. Litt. 326 *b*. 1 Leon. 262. Cro. Eliz. 514. 3 Rep. 51 *b*.
(*b*) Chap. 16, sect. 21.

recovery. In order to prevent such alienations, and to preserve for the issue of the marriage the provisions intended for them, as also to continue the estate in the family of the husband, from whom it proceeded, and by whom it was settled, it seems that the legislature, taking as a pattern the statute *de donis conditionalibus* (*a*), passed the act of the eleventh of Henry the seventh (*b*), which provides and declares "that any woman who had or should have any estate in *dower*, or for *life*, or in *tail jointly* with her husband, or *only to herself*, or to *her use*, in any manors, lands, tenements, or other hereditaments of the inheritance or purchase of her husband, or given to the husband and wife, in tail or for life, by any of the ancestors of the husband, or by any other person seised to the use of the husband, or of his ancestors, and had or should, being *sole*, or with any *after taken husband*, discontinue, alien, release, or confirm with warranty, or by covin suffer any recovery of the same against them or any of them, or any other seised to their or either of their use; all such recoveries, discontinuances, alienations, releases, confirmations, and warranties shall be utterly void and of none effect. And that it shall be lawful to *every* person to whom the interest title or inheritance, after the decease of the women, of the manors, &c. being discontinued, aliened, and suffered to be recovered after the first day of *December* then next shall appertain, to *enter* into all and every the premises, and peaceably to possess and enjoy the same in such manner and form as he or they should have done if no such discontinuance, warranty, or recovery had been had or made. And that if any of the said husbands and women, or any other seised to the *use* of them, of the estate before specified, after the said first day of *December*, make or cause to be made or suffer

11 Hen. 7, c. 20. Discontinuances or fraudulent recoveries by dowresses or jointresses *ex provisione virorum* void.

Right of *entry* given to the persons next intitled.

(*a*) 13 Edw. I. c. 1. (*b*) Chap. 20.

any such discontinuance, alienations, warranties, or recoveries, in form aforesaid, that then it shall be lawful to the person or *persons* to whom the said manors, &c. *should or ought to belong* after the decease of the said women, *to enter* into the same, and them to possess and enjoy according to such title and interest as they should have had if the same women had been dead, no discontinuance, warranty, nor recovery had, as against the said husband during his life, if the said discontinuance, alienation, warranties, and recoveries be hereafter had by or against the same husbands and women during the coverture between them. PROVIDED that the said women, after the decease of their said husbands, may *re-enter* into the same manors, &c. and them to enjoy according to their *first* estate in the same. AND that if the said women, at the time of such discontinuance, alienations, recoveries, warranties after the said first day of *December*, to be had and made of any of the premises, be *sole;* then they shall be barred and excluded of their title and interest in the same from thenceforth, and the person and persons to whom the title, interest, and possession of the same should belong after the decease of the said women, shall *immediately after* the said discontinuances, alienations, warranties, and recoveries, *enter* into the same manors, &c. and them to possess and enjoy according to his or their title in the same. PROVIDED also that the act extend not to any such recovery or discontinuance to be had where the heirs next inheritable to the said women, or he or they that next after the death of the same women should have estate of inheritance in the same manors, &c. be *assenting* or agreeable to the said recoveries, where the same assent and agreement are of record or enrolled. PROVIDED farther, that it shall be lawful to every such woman, being sole, or married after the death of her first husband, to give, sell, or make discontinuance of any such lands for term of *her life* only, after the course and

Re-entry being given to the widow after his death.

But the act bars her if sole at the time of the discontinuance, and immediate entry is given to the person next intitled.

The statute excepts discontinuances made with consent of persons next intitled,

and preserves the widow's right to alien for her life.

usage of the common law before the making of this act."

32 Hen. VIII. c. 36.

The last act was referred to and confirmed by the subsequent statute of Henry the Eighth (*a*), which was passed for the exposition of the statute of fines; and it provides "that the act itself (the 32 Hen. 8), nor any thing therein contained, shall extend to bar or exclude the lawful entry, title, or interest of any heir or heirs, *person* or *persons*, heretofore given, or hereafter to be given, grown, or accrued to them or any of them, in or to any manors, &c. by reason of any *fine* or *fines* heretofore levied, or hereafter to be levied by any woman after the death of her husband, contrary to the form, intent, and effect of the statute of 11 Henry the Seventh, c. 20, of any manors, &c. of the inheritance or purchase of her husband or of any of his ancestors, given or assigned to any such woman in dower, for life or in tail, in use or possession; but that the same act (11 Henry 7), shall stand, remain, and be in full strength and virtue in every article, sentence, and clause therein contained, in like manner and form as though the present act had never been made."

These statutes being *remedial*, they, like the act of 32 Henry 8, chap. 28, considered in a former chapter (*b*), have been construed liberally, according to their spirit and intention, and not according to the letter (*c*).

(*a*) 32 Hen. 8, chap. 36, sect. 2. (*b*) Chap. 2, pp. 56, et seq.

(*c*) It has been argued, that the statute preventing the widow from aliening the inheritance, deprives her by implication of the right of cutting timber. But it is decided that tenant in tail *ex provisione viri*, even after possibility of issue extinct, is dispunishable of waste at law, and has a property in the timber cut. Williams v. Williams, 15 Ves. 419. 12 East. 209. But after possibility of issue extinct, she may be restrained from committing equitable waste, Cook v. Whaley, 1 Eq. Ca. Ab. 220. 400. 3 Madd. 529. Williams v. Day, 2 Ch. Ca. 32. Anon. 2 Freem. 278. Abrahall v. Bubb,

The statute of Henry the Seventh seems to anticipate and only to provide against the discontinuances of such tenants in dower whose titles are complete under assignments of dower; for the expressions are, "any woman who had or should have any estate in dower." Yet these words have been considered as embracing a mere title to dower. It was accordingly said by *Rhodes*, J. in *Barker* v. *Taylor* (*a*), that "if a woman, having title to dower, enter and levy a fine *before* she be endowed, such fine is within the act, although she be not tenant in dower."

Stat. of Hen. VII. extends to a mere title or right to dower,

In commenting upon the statute of Hen. 7, c. 20, as proposed, we shall proceed to consider,—

First, what estates and interests fall within the provisions of the statute, taking that act as the guide and director in the arrangement of the remarks to be made upon it.

1. The subjects mentioned in the act are manors, lands, tenements, and hereditaments; and it has been adjudged that the statute extends to *trust*-estates settled by the husband in trust for his wife; and for this reason, that as the act expressly mentions lands holden to the *use* of the wife, it necessarily includes modern trusts, and also equities of redemption (*b*). Trusts being at the time of passing the statute mere uses at common law.

and to trust-estates,

and equities of redemption.

Accordingly, in *Symson* v. *Turner* (*c*), the husband

---

2 Freem. 53. 2 Show. 69. 2 Eq. Ca. Ab. 757. 2 Swan. 172. See 15 Ves. 431. 3 Madd. 338. It seems doubtful whether a jointress tenant in tail, before possibility of issue extinct, will be restrained from equitable waste: the question bears an analogy to that which was discussed in the Attorney-General v. the Duke of Marlborough, 3 Madd. 498, where the Vice-Chancellor was of opinion that a tenant in tail, restrained by a special Act of Parliament from barring the entail, was not within the principle on which equitable waste is enjoined.

(*a*) 2 Leon. 168. (*b*) 2 Vern. 489. (*c*) 1 Eq. Ca. Ab. 220.

vested in trustees real property in trust, as to lands of the annual value of 150*l.* for the wife in tail general, remainder in trust for the husband in fee. There was no issue of the marriage, and the husband died. His widow suffered a recovery, and devised the lands for the payment of her debts, and died without issue. Upon the bill of the husband's heir against the creditors of the wife, the Court decided that the case was within the statute.

2. The act declares "that any woman who had or should have any estate for life, or in tail *jointly* with her husband, or only to herself, or to her use, in any manors, &c. of the *inheritance* or *purchase* of her husband, or *given* to the husband and wife in *tail* or for *life* by any of the ancestors of the husband, or by any other person seised to the use of the husband, or of his ancestors," and should discontinue, &c. Such are the estates mentioned in the act; but in consequence of the liberal construction which has been put upon the statute, it has been determined, that whenever an estate has been derived, either from the husband himself, or from any of his ancestors, it is within the meaning and protection of the statute.

The estates which fall within the statute.

Jointures by husband.

It appears, then, that the estate settled in jointure must be either the inheritance or purchase of the husband, or the gift of his ancestors; we shall, therefore, consider in the first place, such a jointure of the inheritance of the husband immediately proceeding from him as is comprehended within the act.

Thus, in *Lynch* v. *Spencer* (*a*), the husband being seised of lands in fee, enfeoffed *B*, upon condition to regrant them to husband and wife in tail, which was accordingly done. There was issue a son, and the husband died, the son being tenant in tail, with the

---

(*a*) Cro. Eliz. 513. Moor, 455. 3 Rep. 50 *b*. S. C. *sub. nom.* Brown's case.

reversion in fee in himself. He levied a fine with proclamations to *C* in fee. The mother afterwards demised the estate to *D* for his life, upon whom *C* entered under the statute, insisting that the demise to *D* by the widow was a discontinuance and a forfeiture under the act. And the Court decided three points, 1st, that although the estate tail to husband and wife was derived from the feoffees, yet as it was done *ex procuratione viri*, it was an intail by the provision of the husband within the statute; 2dly, that the lease made by the widow for the life of the lessee, was a discontinuance within the same act; and 3dly, that the effect of the fine being to bar the estate tail, and to pass the reversion in fee to *C* the conusee, he was authorized by the statute to enter upon the lessee as the person next intitled in reversion.

By husband's ancestors.

3. We shall now proceed to adduce instances of such jointures made upon the wife, by her husband's relatives or ancestors of their estates of inheritance, as fall within the operation of the statute.

In *Sharington* v. *Strotton* (*a*), *A*, in consideration of the marriage of his brother *B* with *C*, covenanted to stand seised of lands to the use of himself for life, remainder to the use of *B* and *C* for their lives. This was adjudged to be a provision within the statute, as proceeding from an *ancestor* of the husband.

Instances where a part only of the jointure is protected by the statute.

It may happen that part of the lands settled in jointure on the wife by the husband's ancestor may be protected by the statute against her discontinuance after the husband's death, and that the remainder may not be comprehended within the act, so as to leave to the wife the same power of disposition over it as before the passing of the statute.

Thus, if lands be given by the husband's father to the son and his intended wife *before* marriage in fee

(*a*) Plowd. 300, 307.

simple, and they after the coverture levy a fine of the *whole* to the father, who grants again the estate to them in tail, the husband's moiety only is within the statute; for the first gift of the father in fee simple was not within the act, and the donees took the lands in moieties in their own rights: when, therefore, the husband and wife joined in the fine, their several shares passed to the father, the one from the wife and the other from her husband; so that, upon the regrant by the father, the wife's moiety could not be considered as proceeding from the husband's *ancestor* within the intent and meaning of the statute (*a*).

So also, in the case of *Laughter* v. *Humphrey* (*b*), a man and woman, being joint-tenants in fee of a manor, married, and afterwards levied a fine to a stranger, who rendered the manor to them in tail. The wife, after surviving her first husband, took a second, and joined with him in a fine of the estate. It was determined, that the fine was void only as to the moiety of the manor which had originally been the estate of the first husband, that moiety alone being protected by the statute.

Instances where money paid by wife's friends will not take the jointure made upon her by her husband's ancestor out of the act.

The reader will have noticed, that the statute strictly applies to cases only where the property is *given* to the husband and wife, in tail or for life, by any of his ancestors; but according to the liberal construction of the act, it has been adjudged, that although money may have been given by the wife or her friends for the settlement made upon her, yet if marriage constituted part of the consideration, the estate will fall within the provisions of the statute.

Thus, in *Moor* (*c*), the law upon this subject is stated to be, that if the ancestor of the husband covenant to stand seised of land to the use of the hus-

---

(*a*) The Queen v. Savage, Moor; 715. (*b*) Cro. Eliz. 524.
(*c*) Page 93.

band and wife in consideration of marriage, and also in consideration of money, and the wife alien the estate after her husband's death, his heir may enter under the statute, for the consideration of marriage is to be preferred to that of money, and then the provision will be considered as the *gift* of the husband's ancestor, and within the act. In affirmance of this proposition the case of *Villers* v. *Beaumont* (*a*) is referred to, which was to the following effect:

A grandfather conveyed lands to *B* for thirty years, remainder to himself and wife for their respective lives, remainder to his son for life, remainder to his grandson and *C* the daughter of *B* in special tail; after which followed these words, "for the which manor bargained, and other the premises, the said *B* covenants to pay the said sum of 70*l.* at certain days," &c. The grandson married *C*, who survived him and his father, and *C* with a second husband levied a fine of the lands. A jury found *dehors* the deed, that the transaction was as well in consideration of the marriage as of the money; and it was held by three judges against *Dyer* that the fine was void, for they expounded the words of the statute, "given by the ancestors," &c. to be any lands assured to a woman in jointure, either for money (as few marriages were made without it) or else freely.

And in another case, where *A* being seised in fee of lands, covenanted with *B*, in consideration of 200*l.* paid by *B*, and of a marriage between *C* the son of *A*, and *D* the daughter of *B*, to convey the lands to the use of *C* and *D*, and the heirs of the body of *D*, with remainder to his own right heirs. The marriage took effect, and the lands were settled; there were issue of the marriage, and then *C* made a feoffment of the estate, and, with his wife, levied a fine to the feoffee. One of the questions was, whether the set-

---

(*a*) Dyer, 146, *a*. Bendl. 39.

tlement on the wife, being made in consideration of *money* paid by her father, as well as of the marriage, came within the provision of the statute? And it was resolved in the affirmative (*a*).

When the wife's jointure is to be considered as of the *purchase* of the husband or his ancestors.

4. The instances which have been given relate merely to provisions settled upon the wife of estates the *inheritance* of her husband or the *gift* of his ancestors, but the statute extends to lands, &c. so settled, which were of the *purchase* of the husband or of his ancestors; and what have been considered purchases within that clause of the act, will be the subject next to be inquired into.

It is said that if husband and wife join in selling her estate, and purchase other lands with the money, which are settled upon both of them, that will be a jointure within the act; because the money was a chattel vested in the husband, which he might have disposed of as he pleased; so that, when he invested the money in the purchase of lands, and settled them upon himself and wife, the law will consider such purchase and settlement as a jointure on the wife, within the meaning of the statute (*b*).

So also, if the transaction be between a stranger, the wife's friends, and the husband; and the stranger, in consideration of a sum of money paid by the husband and the friends of his wife, settle lands upon her in jointure, that will be considered a purchase and settlement by the husband within the letter and meaning of the statute.

Thus, in *Piggot* v. *Palmer* (*c*), *A* agreed to sell to *B* an estate for 160*l.*; *B* being about to marry *C* the daughter of *D*, *D* paid 140*l.* of the above sum to *A* in consideration of the marriage of his daughter with *B*; upon which the conveyance from *A* of the estate was

---

(*a*) Kirkman v. Thompson, Cro. Jac. 474. (*b*) Palm. 217.
(*c*) Moor, 250.

made to *B* and *C*, and the heirs male of their bodies. They intermarried, had issue, and *B* died. *C* took a second husband *E*, and they accepted from a stranger a fine *sur conuzance de droit come ceo*, &c. and rendered the estate to *F* for a term of 100 years, reserving a rent, and then *C* died. The first husband's heir entered upon the lessee under the statute, and the question was, whether such entry was lawful? And the Court decided in favour of the heir, observing that the wife's estate under the first purchase was within the act, and that the acceptance of the fine and the render of the estate for the term of years made that estate void by force of the statute.

What estates are not within the statute.

SECOND. After having considered the estates and interests which were comprehended under this statute, it is proposed to inquire what estates and interests are not included within the scope of the act. And,—

Copyholds are not so.

1. Copyhold estates are not within the act, for an entry being given by it, a person would be introduced as tenant, without being admitted by the lord of the manor (*a*).

But if, by a transaction between the lord of the manor and the husband, the copyhold is extinguished and the lands are settled in jointure upon the wife, that will be a settlement within the statute.

Accordingly, in *Stockbridge*'s case (*b*), the husband and wife were joint copyholders to them and their heirs. The husband, in consideration of money paid by him to the lord of the manor, obtained an estate of *freehold* to him and his wife, and to the heirs of their bodies. The husband died leaving issue, and his widow entered and suffered a recovery, upon which his heir entered for a forfeiture under the statute, and

---

(*a*) Gilb. Ten. 181. See Harrington v. Smith, 2 Sid. 41. 73.
(*b*) Cro. Eliz. 21.

it was resolved that his entry was lawful, for the copyhold tenure was extinguished by the acceptance of the new estate.

Neither are estates which belong to the wife, or are derived from her ancestors.

2. We have seen that the statute only provides against the discontinuances of widows, of estates which they held in jointure, of the inheritance or purchase of their husbands, or of the gifts of the ancestors of the husbands, or by any persons seised to the uses of the husbands or their ancestors. If, therefore, the estates settled in jointure be the wife's own property, or be derived from any of her ancestors, such jointures are not within the provisions of the statute of Henry the Seventh. As illustrative of this,

Husband and wife, seised of lands in right of the wife, levied a fine *sur conuzance de droit come ceo*, &c. and took back an estate to themselves in tail general, remainder to the right heirs of the wife. The husband died, leaving issue a son; the wife married a second husband, with whom she joined in levying another fine, upon which the son entered for a forfeiture under the statute; but it was determined that the last fine was not a forfeiture under the act; because the estate was originally the property of the wife (*a*).

And it is said to have been adjudged 21 *Eliz.* upon the same principle, that if the husband be seised of lands in right of his wife, and both of them join in levying a fine, and the conusee grant a *rent* to them in tail, and the husband dies leaving issue, and then the widow aliens the rent, such disposition is not within the provision of the statute (*b*).

And money paid by the husband or his friends will not bring such estates within the statute.

It has been shown, that if the estate settled upon the wife belong to her husband or his ancestors, the jointure will be comprehended within the statute,

---

(*a*) Eyston v. Studde, Plowd. 463; and see Cro. Eliz. 524, Moor, 715. (*b*) Cro. Eliz. 2.

although money may have been paid by the wife or her friends for the provision; so also if the lands settled belong to the wife or to her relations, payment of *money* by the husband or his friends in consideration of the marriage, will not make him or them *purchasers* of the estate within the statute; for the estate, moving from the wife's father or relations, is neither within the words nor the meaning of the act; and with respect to the money paid by the husband or his friends, it is not to be considered as advanced solely in purchase of the specific estate, but in consequence, and as a part of the marriage contract.

Thus, in *Kynaston* v. *Lloyd* (*a*), *A* having two daughters, *B* and *C*, and being seised in fee of an estate of the yearly value of 20*l.* covenanted with *D*, the intended husband of *B*, in consideration of the marriage, and in consideration of 115*l.* to be paid by *D*, to assure the lands by fine to the use of himself for life, remainder to the use of *D* and *B* and the heirs of their bodies, remainder to the heirs of the body of *B*, with remainder to *C* and her right heirs. The assurance was made, and the marriage took effect. *D* paid the 115*l.* and there was a son of the marriage, and then *D* died. *B* took a second husband, and aliened the lands by fine. The son entered for a forfeiture under the statute; and the question was, whether this was an estate within the act? And it was decided in the negative, because the lands moved from the wife's father, and her advancement in marriage was intended to be the cause of the gift, and not the money; and the Court said, that although the husband paid 115*l.* the sum was not intended as a valuable price of the land, but for the purpose of having the estate limited to him as well as to his wife, in order that he might have the lands although he should have no issue. The Court also acted upon the

---

(*a*) Cro. Jac. 624. Palm. 217. Jenk. 319.

same principle, in the subsequent case of *Copland* v. *Pyatt* (*a*).

There, the father having three daughters, *B*, *C*, and *D*, covenanted with *A* the then husband of his daughter *B*, in consideration of 400*l*. paid by *A*, and in consideration of the marriage, and preferment of the blood of the father, to stand seised of lands to the use of *A*, and *B* his wife, and the heirs of the body of *B*, remainder to the use of the father's other daughters in tail, with remainder to his own right heirs. *A* died without issue, and *B* conveyed the lands to a stranger by fine. And, whether the alienation was a forfeiture, was the sole question. And it was resolved that *B* was not a jointress within the statute, although 400*l*. had been paid by *A*, because the estate first moved from the father, and the advancement was made by the ancestors of the wife, and was not of the purchase or assurance of the husband or of his ancestors.

Nor will a jointure voluntarily made by a stranger be within the act.

3. It seems that, in order to bring the jointure settled upon the wife within the statute, when the lands are not the property either of the husband or of any of his ancestors, but of a stranger who makes the settlement, such settlement must, under the term *purchase*, &c. mentioned in the act, have been procured by the husband or his ancestor for a *valuable* consideration; so that if the inducement for the stranger to make the jointure were merely *voluntary*, as from friendship to the husband, or in consideration of past services, such settlement would not be subject to the restrictions of the statute. To exemplify this,

The *Bishop of Exeter*, in consideration of the *good services* done by *A*, his domestic male servant, as for divers other considerations, and in contemplation of a marriage between *A* with *B*, the cousin of the bishop, enfeoffed *A* and *B* of lands to them and the heirs of

---

(*a*) Cro. Car. 244.

their bodies. The marriage took effect, and *A* died. His widow, *B*, levied a fine of the lands, and one of the questions was, whether the jointure came within the provisions of the statute of Henry the Seventh? And it was determined in the negative: 1st, because it was not a gift by the husband nor by any of his ancestors; and, 2dly, for the consideration of the service of the husband was not such a purchase by him as the law intended, but that the jointure was the mere *voluntary* gift of the Bishop, and that the case was not altered either by the expression in the feoffment "of other considerations" (since none in particular were mentioned), nor by the Bishop naming *B* in the deed as his cousin (*a*).

Nor where the lands limited or devised to the wife were not settled as an advancement, but in such manner as to show that the reversioner or the husband's heirs were not considered.

4. Since the design of the statute was to prevent discontinuances by jointresses of the lands of their husbands, to the prejudice of such husbands and their heirs, it is a consequence, that if the settlement be so made upon the wife as to show that no regard was paid to the succession of the heirs of the husband to the estate, that will be a case not within the meaning of the act, although it be within its letter. This may happen when no interest is expressly given or limited to the heirs of the husband, but the remainder expectant upon the estate given to the wife is limited to a stranger; an instance of which occurred in the case of *Foster* v. *Pitfall* (*b*).

There, a man being seised in fee of lands, devised them to his wife in tail-*general*, remainder to a stranger, and died. His widow married again, and suffered a recovery of the estate. The question was, whether the alienation was a forfeiture within the statute?

(*a*) Ward v. Walthew, Cro. Jac. 173. Brownl. 137. Noy, 122. Yelv. 101. Moor, 683, S. C. (*b*) Cro. Eliz. 2. 1 Leon. 261, S. C. Hughs v. Clubb, 1 Com. Rep. 369. And see 6 Taunt, 100. 103.

And it was decided in the negative, the Court observing, that the case was within the *letter* but *not* the meaning of the act, that the statute only applied to lands given by the husband or his ancestor, for the advancement of the wife, and that the remainder of the estate being limited to a stranger should not be intended a jointure, no inheritance being to revert to the husband or descend to his heirs.

So also, if the jointure settled upon the wife by her husband or his ancestors be not for life, or in tail, but in fee simple, such jointure will be neither within the letter nor the meaning of the statute, for it is not within the letter, as jointures for life, or in tail alone, are mentioned in it, neither is the jointure within the meaning of the act, for since general restraints of alienation, annexed to limitations of absolute estates of inheritance, are repugnant and against the rule of the common law, it is not to be presumed that the legislature meant to countenance and give effect to such restraints by a statutable provision, when the words of the act are insufficient for that purpose; the wife's alienation, therefore, of an estate in fee-simple, settled in jointure by her husband or his ancestors, will not be a forfeiture within the act (*a*).

Whether a widow tenant in tail general *ex provisione viri*, the reversion being in the husband's heir, is within the statute.

[The reasons given for the judgment in *Foster* v. *Pitfall*, imply that the wife having an estate in tail general, *ex provisione viri*, would be restrained from alienation, if the reversion were in the husband or his heirs. So in *Simpson* v. *Turner* (*b*), where the lands were settled on the wife in tail general, with remainder to the husband and his heirs, the case was held to be within the statute. But it appears to have been held in *Hughs* v. *Clubb* (*c*), that if the husband devises to his wife in tail general, and the reversion descends to

---

(*a*) 4 Rep. 3 *b*. (*b*) 1 Eq. Ca. Ab. 220. (*c*) 1 Comyn. 369.

his own heirs, the wife is not within the restriction of the statute: the marginal note of this case, however, states the point differently (*a*).

In *Gretton* v. *Haward* (*b*), it was argued that the statute did not extend to estates devised to the wife by the husband. But a devise is within the words, and in *Foster* v. *Pitfall*, and *Hughs* v. *Clubb*, it does not seem to have been doubted that the statute would have applied, if the limitations contained in the will had been different.]

THIRD. The subject which next presents itself, after the consideration of what estates settled in jointure are and are not within the statute of Henry the Seventh, is, what species of alienation will be a forfeiture within its letter and meaning.

What alienations are and are not within the statute.

1. We have seen that the statute only provides against the discontinuances of wives when sole, or with after-taken husbands, of estates settled on the widows by their former husbands, or the ancestors of such husbands; so that fines or recoveries suffered by such women *with* their husbands, by whom or whose ancestors the jointures were made, are not within the letter of the statute; yet a case is cited by *Lord Coke* as having been determined at *Nisi Prius* (*c*), by which it was adjudged, that where a man seised of lands in fee settled them to the use of himself for life, remainder to the use of his wife and the heirs male of her body by him for her jointure, and they, having issue, levied a fine, and suffered a recovery, and then died, the issue might enter, although the case was not within the letter of the statute, since it was within the mischief intended to be prevented, viz. the disinheriting of the issue of the marriage.

(*a*) On this question, see Preston on Conveyancing, vol. i. p. 20. Gilbert. Uses, by Sugden, p. 342. (*b*) 6 Taunt. 94. 2 Marsh. 9.
(*c*) Hartley v. West, Co. Litt. 365 *b*.

Fines or recoveries by wife and her husband who made the jointure, are not within the act.

But the above decision was afterwards over-ruled by the case of *Kirkman* v. *Thompson* (*a*), in the Court of King's Bench; in which case that Court adjudged, that the alienation by fine of husband and wife, of lands settled upon her in tail *ex provisione viri*, was not a forfeiture within the words or the intent of the statute; not within the words, as before appears, and not within the meaning of it, because the husband who made the jointure concurred with his wife in the alienation; and the Court said that the statute being in restraint of the common law, was to be construed strictly, and that it only intended to provide against the disinherison of the husband's heirs contrary to his intention.

But a lease by widow for life of lessee, or during three lives, not authorized by stat. 32 Hen. 8. is a discontinuance within act of Henry 7.

2. Since the statute intended to guard the husband's heirs against the widow's *discontinuance* of the estate holden by her in dower or jointure, it follows, that if she demise the lands for the life of the lessee, or for three lives, not warranted by the act of Henry the Eighth (*b*), such demises will be alienations of the freehold within the statute of Henry the Seventh, they being discontinuances without the addition of warranty (*c*).

Not a term for years except so granted as would defeat the statute.

3. But a lease for years not being a discontinuance, is not in general prohibited by the statute; yet if, by the grant of a term for years, the act is attempted to be defeated, such a liberal construction will be given to the statute as to include the transaction within its spirit and meaning.

Accordingly, in the case of *Barker* v. *Taylor* (*d*), a woman tenant in tail within the statute accepted a fine *sur conuzance de droit come ceo*, &c. and ren-

---

(*a*) Cro. Jac. 474. (*b*) 32 Hen. 8. chap. 28, treated upon in the second chapter of this work, p. 56. (*c*) Lynch v. Spencer, Cro. Eliz. 514. Brown's case, 3 Rep. 50 *b*. (*d*) 2 Leon. 168. See 3 Rep, 51 *b*. Cro. Eliz. 514. Cro. Car. 234. 3 Keb. 333.

dered back the lands by the same fine to the conusor for one hundred years. Question, whether the grant of this term was a disposition within the act, which speaks of discontinuances only? And the Court was of opinion, that it was an alienation within the statute, although no discontinuance, because if it were not to be so considered, the intent and operation of the act would be defeated by such a practice; the Court observing, that if such a render for one hundred years should be good, it would be equally so for one thousand years, which would be as injurious to the person in remainder or reversion as a discontinuance.

The reason why the last term should be considered an alienation within the statute, and other terms granted by deed should not be so considered, is founded upon these circumstances: that the one being created through the medium of a fine, would, if not included within the restrictions of the act, bind the estate during the whole of the period; but the terms in the other instance may not have that effect, since they are voidable by the issue in tail, if not made under the authority of the statute of Henry the eighth before referred to (*a*).

If widow be vouchee in a recovery that will be within the act.

4. Although the words of the statute appear to extend to recoveries only suffered *by* the widow alone, or by her with a second husband, yet if she singly or jointly with such a husband be vouched, and come in as *vouchee*, that transaction will be considered as within the intent of the act, and therefore a forfeiture (*b*).

FOURTH. Having considered some of the alienations by the widow singly, and jointly with an after-taken husband, that fall within the provisions of the statute of Henry the seventh, it is proposed next to inquire into the effect of that act upon such transactions in regard to the estates so discontinued.

(*a*) Crocker v. Kelsey, Bridg. 27. 2 Roll. Rep. 490. Cro. Jac. 688. (*b*) Moor, 716.

Entry necessary to defeat the discontinuance.

The statute, according to its letter, makes void to all intents and purposes all discontinuances and covinous recoveries, made and suffered by the persons before described; yet the conclusion of law has been different in analogy to similar cases decided upon other statutes, so that discontinuances by widows alone of lands, *ex provisione virorum*, or by them jointly with after-taken husbands, are not *immediately* void, but continue until they be defeated or determined by *entry* of the persons to whom the interest, title, or inheritance would belong, if the women committing such acts were dead (*a*); and in regard to all other persons, and particularly the parties to the discontinuances, such alienations continue in force and cannot be determined by entry.

Persons intitled to enter.

The right of entry given by the statute is not confined to the heir of the husband, but is extended to the person to whom the inheritance is to go after the decease of the widow, whether he be the heir of the husband, or a stranger deriving title under such heir (*b*). But a distinction must be noticed when the alienation of the heir operates only by conclusion and *estoppel*, and when the *inheritance* of the estate passes to his alienee. In the first case, the claimant under the heir cannot enter under the statute, because such person has no interest, title, or inheritance in the estate upon the widow's death, in respect of which only an entry is given; but in the second instance, as the alienee has such an interest, he is within the words of the act, and may therefore enter. In order to elucidate this distinction: if a widow be tenant in tail, *ex provisione viri*, and the issue in tail having no other interest but a *right* to the intail, levy a fine to a stranger, and then the widow discontinue the estate; since the fine of the issue operates by conclusion and estoppel only, and

When the conusee of the heir may and may not enter.

(*a*) Lincoln College case, 3 Rep. 59 *b*. (*b*) See Lynch v. Spencer, *supra*, p. 612.

passes no estate to the conusee, he cannot enter under the statute for the reason before mentioned, neither can the conusor or his issue do so, because they are barred by the fine (*a*). But if the conusor had been seised of the remainder or reversion in fee expectant upon the estate in tail at the time when the fine was levied, then since such remainder or reversion passed to the conusee, in respect of which he answered the description in the statute of the person "to whom the interest, title, or inheritance, after the decease of the woman, appertained," he is intitled and may enter under the authority and express words of the statute.

Accordingly in *Brown*'s case (*b*), *A* enfeoffed trustees upon condition that they gave back the lands to him and his wife, and the heirs of their two bodies, remainder to the *right heirs* of *A*. The condition having been performed, *A* died, leaving his wife and *B* a son by her. *B* during his mother's life conveyed the lands by a fine to *C*, after which the mother demised them for three lives to *D*, the lease not being made according to the statute 32 Henry the eighth (*c*). *C* therefore entered upon the estate under the statute of Henry the seventh for a forfeiture; the question was, whether his entry was lawful under that act? And it was resolved in the affirmative, because he was the person who had the immediate right to the inheritance after the death of the wife.

It must be remarked that the alienation in the last case by the son tenant in tail in remainder being by fine, the effect of that mode of conveyance was not only to bar the conusor, but also the right of entry of his issue by barring the estate tail, and transferring such right of entry from the issue to the conusee, as before described. But if the conveyance had been by

And when the act of the first issue in tail will and will not bar the rights of entry of the succeeding issue.

(*a*) Cro. Jac. 175. Ward v. Mathew, Noy, 122. 3 Rep. 51 *a*.
(*b*) 3 Rep. 50 *b*. (*c*) See *ante*, p. 95.

lease and release, &c. instead of fine, then although the remainder in fee would have passed to the releasee, yet as by such mode of conveyance the intail would not be barred, the issue's right of entry would be preserved. So also if *after* the widow had made the discontinuance, the son had conveyed by lease and release, the entry of his issue would not have been prejudiced.

Thus the case put in *Doctor and Student* (*a*) was in that of *Lincoln College* (*b*), affirmed to be good law. The case proposed was to this effect, that if a woman tenant in tail *ex provisione viri* suffer a recovery, and the issue in tail *release* to the recoveror, yet the issue of the releasor may enter. The reason is, that immediately upon the recovery being suffered, a right of entry became vested in the issue, and by a mere deed of release the first issue in tail could not bar his descendants of such a right.

Rule, that to authorise an entry under the act, the person's title to the estate must be *immediate* after the widow's death;

except in the instance of a posthumous son.

The rule laid down by the Court in the case of *Lincoln College* was, that a person who is not *in rerum naturâ*, or who has not the immediate interest, title or inheritance at the time of the forfeiture, shall never take the benefit of the statute when another person was *in esse* at that period, and could not enter, but had the power to bar by fine or recovery the person who would claim the benefit of the act. It was accordingly resolved, that the first issue in tail having, by recovery had against him by his own agreement, disabled himself from entering, under the act, on the widow's forfeiture by alienation, his issue were equally precluded from so doing after his death. But *Lord Coke* states a case that may happen which would not be within the rule, although the person upon whom the reversion in fee descended, disabled herself from entering for a forfeiture by the widow's discontinuance. His Lordship said, he conceived that if a man made a feoffment in

---

(*a*) Lib. 1, chap 31. (*b*) 3 Rep. 61 *a*.

fee to the use of himself and wife in tail, remainder to the use of himself in fee, and had issue a *daughter*, and died, leaving his wife *enseint* of a *son*, so that the reversion in fee descended to the daughter, if she and her mother joined in levying a fine or suffering a recovery before the birth of the son, or if the widow alone levied a fine or suffered a recovery, and the daughter neglected to enter, or had disabled herself from taking the benefit of the act, yet the son would be intitled to enter under the provisions of the statute. The principle upon which such opinion is founded seems to be this, that the son's right being intitled to a preference to that of the daughter, and he consequently not claiming or deriving title from or through her, she had no power to prejudice his estate by any act or omission of her own; the son, therefore, having the immediate interest, title or inheritance after the death of the widow, is intitled to enter for the forfeiture committed by her (*a*).

Widow's discontinuance with consent of heir, &c. no forfeiture giving a right of entry.

The reader will have noticed that the statute excepts out of its provisions such recoveries and discontinuances as are suffered and made with the heir next inheritable to the widow, or where the person who next after her death has the inheritance and assents as of record to those acts.

If, therefore, a jointress for life, and the heir of her husband, the first tenant in tail in remainder expectant upon her estate for life, concur after the husband's death in levying a fine or suffering a recovery, neither of those acts being within the penalties of the statute, there will be no forfeiture incurred, and consequently no right of entry given to any person, but the assurance will be lawful, and the intail barred (*b*).

Leases for years by jointress confirmed by the fine of the issue.

5. Connected with the present subject is the effect of a fine by the issue in tail in confirming the widow's

(*a*) 3 Rep. 61 *b*. (*b*) 3 Rep. 60 *b*. Curtis v. Price, 12 Ves. 89.

lease for years, granted by deed of the estate in jointure settled upon her in special tail, and not warranted by the statute of Henry the eighth (*a*). Such a lease is good till avoided by the issue after the widow's death, who may determine it by entry; but if he omit to do so, and levy a fine of the estate, the lease will be rendered firm and binding both upon the issue in tail and the conusee, and also upon the persons in reversion or remainder, during the continuance of the intail, if the term do not sooner expire; and although the reversion in fee, expectant upon the estate tail, be in the issue at the time of levying the fine, which reversion will in that case pass to the conusee, that circumstance will not operate to the prejudice of the lessee, since the conusee cannot be in a better situation than the person in remainder or reversion before mentioned; so that in both instances whilst there are issue in existence who might have inherited under the intail, the lease cannot be impeached. But if there should be a failure of persons capable of inheriting under the intail during the term, then the reversioner in the first case, and the conusee in the second, may avoid so much of the term as remains unexpired, for then the reversion is let in, which the reversioner or conusee claims paramount the lease, and the interest of the lessor (*b*).

If wife be tenant in tail *ex provisione viri* under marriage articles, a Court of Equity will not, as usual, restrain their effect by di-

III. The last subject for consideration in this chapter is, the effect of the statute upon the practice of Courts of Equity in decreeing specific performances of marriage articles.

The principle which induces Courts of Equity to direct the preparation of marriage settlements in such a manner as best to answer the intention of the parties, and the purposes of the marriage contract (although

---

(*a*) 32 Hen. 8, c. 28. (*b*) Crocker v. Kelsey, Bridgm. 27. Cro. Jac. 688. 2 Roll. Rep. 490, 498, S. C.

articles entered into prior to marriage, if literally followed, would not have that effect), does not apply to limitations of the husband's lands in jointure made to the *wife in tail* by articles in contemplation of a subsequent settlement. In order to illustrate the principle of the distinction it is to be observed—

recting a settlement on her for life only, remainder to the children successively in tail, and for what reason.

That if articles be entered into before marriage with a view to a future settlement, limiting real estates of the husband to the parents for their lives, and during the life of the survivor, remainder to the heirs of the body of the husband, the limitation to such heirs will be considered words of *purchase*, and a settlement directed accordingly, viz. after the life estates to the parents, to their first and other son and sons in tail; and for this reason, if an estate tail were given by the settlement to the husband as directed by the articles, he alone might immediately after the marriage bar the issue and defeat a principal part of the settlement, the intended provision for the children of such marriage (*a*).

The like rule prevails when the settled estate belongs to the wife, and the articles limit to her an estate in tail (*b*); because she alone may after her husband's death defeat the settlement, and disinherit the issue of the marriage.

And for the same reason, where articles have limited a joint estate tail to husband and wife, the articles have been performed in limiting estates for life to the parents, and estates in tail to the first and other son and sons of the marriage (*c*).

The principle, then, upon which a Court of Equity proceeds in thus decreeing the performance of marriage articles appears to be, to give effect to the intention of

---

(*a*) Trevor v. Trevor, 1 Eq. Ca. Abr. 387. Streatfield v. Streatfield, Forrest, 176. (*b*) Jones v. Laughton, 1 Eq. Ca. Abr. 392. (*c*) Cusack v. Cusack, 5 Bro. Parl. Ca. 116, 8vo. ed. Nandike v. Wilkes, Gilb. Eq. Rep. 114. 1 Eq. Ca. Abr. 393, S. C. Burton v. Hastings, Gilb. Eq. Rep. 113. 1 Eq. Ca. Abr. 393, S. C.

the parties to them, by preventing either parent singly from defeating the limitations in the settlement after it is executed, which could only be effected by giving to them estates for their lives only, and estates tail to their first and other son and sons.

But when the husband alone has not this power under the limitations in the articles, and his widow after his death cannot bar the intail, the principle that governed the former cases, and upon which the Court founded its jurisdiction to limit estates for life only to the parents, when the articles gave them estates in tail, does not appear to apply. This distinction we accordingly find acknowledged in the cases, a Court of Equity considering that although both parents may, if they think proper, defeat the limitations by a fine or recovery, yet that such a power is not unreasonable, since it might have been left to them for wise purposes, and that, therefore, it is not inconsistent with the probable intention of the articles.

If, then, lands of the husband are agreed by marriage articles to be settled upon himself and wife for their lives, remainder to the heirs of the body *of* the wife *by* her husband, it has been decided that the Court will not interfere and make a different settlement, because the husband *alone* cannot by any act during the marriage destroy the intail in the wife, and she *alone* is precluded from doing so after his death, being under the restriction of the statute of Henry the seventh (*a*).

(*a*) Honor v. Honor, 1 P. Will. 123. Whately v. Kemp, stated 2 Ves. sen. 358. Green v. Ekins, 2 Atk. 473, 477. Highway v. Banner, 1 Bro. C. C. 584, 587. See also 7 Ves. 390.

END OF VOL. I.

LONDON:
PRINTED BY THOMAS DAVISON, WHITEFRIARS.